Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

BRYAN P. HALL,

Petitioner,

vs.

PENNSYLVANIA BOARD OF PROBATION AND PAROLE,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 2003, in a case in which the Pennsylvania Board of Probation and Parole (the "Board") was a party, the Third Circuit held that application of 1996 amendments to Pennsylvania's Parole Act to an inmate sentenced before the amendment's effective date violated the *Ex Post Facto* Clause of the U.S. Constitution. The court held that the amendments changed the focus of the parole analysis and created a substantial likelihood of longer incarceration. In this case, in which the Board was also a party, the Supreme Court of Pennsylvania rejected the Third Circuit's legal conclusion and gave no deference to the Third Circuit's interpretation.

The questions presented are as follows:

(1) whether the Pennsylvania Board of Probation and Parole's application of the 1996 amendment to the Parole Act to an inmate sentenced before the effective date of the amendment violates the *Ex Post Facto* Clause of the U.S. Constitution;

(2) whether the interpretation of federal law by a federal court of appeals binds state courts and, if not, whether state courts should at least give proper regard to such federal interpretations; and

(3) whether the Third Circuit's judgment collaterally estopped the Board from asserting in this case that its retroactive application of the 1996 amendments does not violate the *Ex Post Facto* Clause?

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Petitioner Bryan P. Hall is an inmate in a Pennsylvania state correctional facility. The Pennsylvania Board of Probation and Parole is the state board responsible in Pennsylvania for evaluating inmates' requests for parole according to a statutory and regulatory scheme.

Petitioner Bryan P. Hall respectfully requests that a writ of *certiorari* issue to review the judgment of the Supreme Court of Pennsylvania.

OPINIONS BELOW

The opinion of the Supreme Court of Pennsylvania is published at *Hall* v. *Pennsylvania Board of Probation and Parole,* 851 A.2d 859 (Pa. 2004). The opinion of the Commonwealth Court of Pennsylvania, entered *per curiam* on November 22, 2002, was not published. The two relevant determinations by the Pennsylvania Board of Probation and Parole were not published. All four opinions are reproduced in the appendix.

JURISDICTION

The Supreme Court of Pennsylvania entered its final judgment rejecting Petitioner's claims and ending the state proceedings on June 22, 2004. This Court has jurisdiction pursuant to 28 U.S.C. § 1257. Mr. Hall raised the *ex post facto* issue in his petition for review to the Commonwealth Court of Pennsylvania and again in his appeal to the Supreme Court of Pennsylvania.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. Art. 1, § 10 (the "*Ex Post Facto* Clause")
61 Pa. Stat. Ann. §§ 331.1-331.34a (the Pennsylvania "Parole Act")

STATEMENT OF THE CASE

Factual Background

Between 1941 and 1996, Pennsylvania's Parole Act[1] described the focus of the inquiry of the Board of Probation and Parole (the "Board") as including such varied factors as the inmate's liberty interests and the risk he might pose to the community. The Board's 1989 Manual of Operations and Procedures explained that "the Board . . . feel[s] that an individual should be given every consideration for parole at the expiration of the minimum sentence."[2]

A year later, in what it called "Parole Decision Making Guidelines: A Statement on Policy, Procedure and Philosophy," the Board mandated that "an eligibility for parole expresses a philosophy of presumed release unless information reviewed demonstrates by its preponderance that the public safety interests of the community outweigh the liberty interests of the inmate."[3]

The Board also applied its "Parole Decision Making Guidelines," which assigned numerical values to the various criteria the Board was to consider including risk of recidivism, risk to the community, potential for assaultive behavior, substance abuse, prison misconduct and a number of other factors.[4]

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1 61 Pa. Stat. Ann. §§ 331.1, *et seq.*

2 *See Mickens-Thomas* v. *Vaughn* 321 F.3d 374, 378 (CA3 2003), *cert. denied, Gillis v. Hollawell,* 124 S.Ct. 229 (2003).

3 *Id.*

4 *Id.*

In 1996, Pennsylvania's General Assembly, reacting to a well-publicized incident in which a Pennsylvania parolee was arrested for murder in New Jersey, amended the Parole Act in a number of ways, only one of which is material to this case. The statutory statement of policy now provides that parole served a number of functions both for society and the inmate, but that "[i]n providing these benefits to the criminal justice system, the board shall first and foremost seek to protect the safety of the public."[5] As the Third Circuit noted in *Mickens-Thomas* v. *Vaughn*, the earlier iteration of the statute referred not at all to "public safety."[6]

In its opinion in *Mickens-Thomas*, the Third Circuit described the parole process prior to the 1996 amendments:

> Pre-1996, release upon eligibility for parole was presumed, and any decision to deny parole based on public safety considerations had to be supported by specific reasons, which outweighed those factors favoring release.. . .We conclude, then, that prior to 1996, the Board's concern for potential risks to public safety could not be the sole or dominant basis for parole denial.. . . Moreover, the Board had to weigh all factors, militating for or against parole, and make its decision based on the totality of the factors pertinent to parole, and give appropriate weight to the interests of the inmate.[7]

The Pennsylvania courts have noted that, in 1991, the Board paroled approximately 80 per cent of inmates

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5 61 Pa. Stat. Ann. § 331.1.

6 *See Mickens-Thomas*, 321 F.3d at 377.

7 321 F.3d at 386.

when they had served their minimum sentences. By 1996, that number had fallen to approximately 30 per cent.[8] The Board's own statistics demonstrate that, for the four years before the 1996 amendments, it granted on average 68.55 per cent of parole applications while, in the two years after the amendments, it granted on average only 41.75 per cent of the applications.[9]

The district court that first considered *Mickens-Thomas* noted that there was also a statistically significant difference in parole decisions specific to persons convicted of violent offenses. Before the 1996 amendments, approximately 80 per cent of all applicants were granted parole. In 1997, the Board granted applications for 59 per cent of the non-violent offenders who applied, and it granted applications for 31 per cent of the violent offenders who applied. In 1998, those numbers had dropped to 62 per cent and 24 per cent, respectively.[10]

Petitioner Bryan P. Hall is incarcerated at the State Correctional Institution at Dallas, Pennsylvania. He was convicted in 1991 of aggravated assault and related offenses, and the trial court imposed a sentence that would minimally have expired in 1995 and maximally will expire in 2011. Mr. Hall sought parole in 1995, and the Board rejected his application. He sought parole in each of the following years, and the Board rejected each application.

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[8] *See Commonwealth* v. *Stark*, 698 A.2d 1327, 1332 (Pa. Super. 1997).

[9] Pennsylvania Board of Probation and Parole Annual Statistical Report 1998.

[10] *See Mickens-Thomas* v. *Vaughn*, 217 F. Supp.2d 570, 578 n.2 (E.D. Pa. 2002).

Each time, the Board described to Mr. Hall what steps he should take to satisfy the criteria for parole.

In 1999, Mr. Hall appeared before the Board and it again rejected his application. This time, the Board explained the principal reason for its action by noting that "[f]ollowing an interview and review of your file, the Pennsylvania Board of Probation and Parole has determined that the mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole." The Board denied Mr. Hall's application in 2000, and it gave the same explanation. In each subsequent year, the Board has denied Mr. Hall's applications.

In June 2002, the Board denied Mr. Hall's request and indicated that "[f]ollowing an interview and review of your file, the Pennsylvania Board of Probation and Parole has determined that the fair administration of justice cannot be achieved through your release on parole. You are therefore refused parole and ordered to: be reviewed in or after March 2003." (App. at 27a)

The Board then indicated what steps Mr. Hall should take to maximize his potential for parole at the next consideration: *continue* to participate in or have successfully completed a treatment program for sex offenders, *maintain* a favorable recommendation for parole from the Department of Corrections, *maintain* a clear conduct record and complete the Department of Corrections' "prescriptive programs." (App. at 27a-28a) (emphasis added). In other words, Mr. Hall appeared to have met those conditions and needed only to continue to

do so.[11] The Board's determination seemed to be based solely on the safety interests of the public rather without any balance of Mr. Hall's interests in parole.

In *Winklespecht* v. *Pennsylvania Board of Probation and Parole,*[12] in a 4-3 decision, the Pennsylvania Supreme Court held that retroactive application of the 1996 amendments to the Parole Act did not violate the *Ex Post Facto* Clause of the federal Constitution. Just a few months later, the Third Circuit reached a contrary conclusion in *Mickens-Thomas.* The Third Circuit noted the statistics described above and concluded that the Board's application of the 1996 amendments to those sentenced before the effective date of the amendments posed an *ex post facto* problem. The Third Circuit has applied that holding in a number of cases since *Mickens-Thomas.*[13]

Within months after the Third Circuit decided *Mickens-Thomas,* the Pennsylvania Supreme Court again considered the *ex post facto* issue in *Finnegan* v.

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[11] Mr. Hall filed his legal action in July 2002, and the Board purported to modify its June 2002 determination in an order entered on October 28, 2002. (App. at 29a) The modification, which added some text but gave no indication of additional fact-gathering or analysis, did not obviate the issue presented here in that it continued to focus on the issues required by the 1996 amendments.

[12] 813 A.2d 688 (Pa. 2002).

[13] *See Nolan* v. *Gillis,* No. 02-3423, 2004 U.S. App. LEXIS 9705 (CA3 May 18, 2004); *Hart* v. *Pa. Board of Probation and Parole,* 82 Fed.Appx. 276 (CA3 2003); *McLaurin* v. *Larkins,* 76 Fed.Appx. 415 (CA3 2003).

Pennsylvania Board of Probation and Parole.[14] By a 4-3 vote, the court followed its decision in *Winklespecht.*

In January of this year, the Third Circuit again considered Mr. Mickens-Thomas' case.[15] The court found that, despite its precise instructions on remand in 2003, the Board had failed to implement those instructions and had, again, violated Mr. Mickens-Thomas' right to be free of *ex post facto* punishment. Accordingly, in *Mickens-Thomas II,* the Third Circuit ordered the district court to grant *habeas* relief. The Board did not seek review in this Court.

Proceedings Below

On July 9, 2002, Mr. Hall filed in the Commonwealth Court of Pennsylvania a petition for review in the nature of a request for *mandamus*. He raised there the federal-law argument he raises here: that the Board's application of the 1996 amendments to the Parole Act to him violated the *Ex Post Facto* Clause. The Commonwealth Court denied his petition by order of November 26, 2002. (App. at 25a-26a)

Mr. Hall presented his claim to the Supreme Court of Pennsylvania, which rejected it on June 22, 2004. (App. at 1a-24a) In a 3-1-3 opinion, the court held that it had already decided the legal question at issue in *Winklespecht.*[16] Although Mr. Hall had asked the Pennsylvania Supreme Court to reconsider its holding in *Winklespecht* in light of the subsequent, contrary holding of

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14 838 A.2d 684 (Pa. 2003).

15 355 F.3d 294 (CA3 2004) (*Mickens-Thomas II*).

16 One justice concurred in the result but did not write an opinion. Thus, a majority of the court rejected Mr. Hall's claim.

the Third Circuit in *Mickens-Thomas,* the plurality refused to do so. The state court briefly described the Third Circuit's decision, but it essentially ignored the federal court's reasoning. In fact, the state court explained that it had no need to review the substantive legal question Mr. Hall presented because it had already decided it in *Winklespecht* and in *Finnegan.*[17]

The plurality in *Hall* focused instead on the question of whether it was bound to follow the Third Circuit's decision in *Mickens-Thomas.* (App. at 9a) The court canvassed how various state courts weigh decisions of the federal courts of appeals, and it ultimately concluded that only this Court's pronouncements on federal law bind state courts in Pennsylvania. The court gave no indication that it afforded any deference or even substantive consideration to the Third Circuit's analysis in *Mickens-Thomas.*

The Chief Justice of Pennsylvania, joined by two other members of the court, dissented. (App. at 15a-24a) While they agreed that the state court was not bound by the Third Circuit's pronouncement, they disagreed with "the majority's refusal to consider the reasoning of an inferior federal court on a question of federal law." (App. at 24a) The dissenters also concluded that the court's decisions in *Winklespecht* and *Finnegan* were wrongly decided and in conflict with this Court's decisions in *Garner* v. *Jones*[18] and *California Department of Corrections* v. *Morales.*[19] (App. at 24a).

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17 838 A.2d 684 (Pa. 2003).

18 529 U.S. 244 (2000).

19 514 U.S. 499 (1995).

A few days after it rejected Mr. Hall's claim, the Pennsylvania Supreme Court summarily rejected those of five other Pennsylvania inmates who raised the same issue. *See Albanese* v. *Pennsylvania Board of Probation and Parole,*[20] *Saunders* v. *Pennsylvania Board of Probation and Parole,*[21] *Cox* v. *Pennsylvania Board of Probation and Parole,*[22] *Donton* v. *Pennsylvania Board of Probation and Parole,*[23] and *Werley* v. *Pennsylvania Board of Probation and Parole.*[24] At the same time, just a week before the state court decided *Hall,* another district court in Pennsylvania followed *Mickens-Thomas.*[25]

REASONS FOR GRANTING THE WRIT

A. THE SUPREME COURT OF PENNSYLVANIA'S HOLDING IN THIS CASE CONFLICTS WITH THE THIRD CIRCUIT'S HOLDING ON AN IMPORTANT FEDERAL CONSTITUTIONAL ISSUE.

This case perpetuates a conflict between the Third Circuit and the Pennsylvania Supreme Court on the *ex post facto* issue in this case. The Court has often granted petitions for writs of *certiorari* to resolve such disputes. *See, e.g., Florida* v. *White.*[26]

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20 2004 Pa. LEXIS 1500 (Pa. July 1, 2004).

21 2004 Pa. LEXIS 1502 (Pa. July 1, 2004).

22 2004 Pa. LEXIS 1499 (Pa. July 1, 2004).

23 2004 Pa. LEXIS 1501 (Pa. July 1, 2004).

24 2004 Pa. LEXIS 1503 (Pa. July 1, 2004).

25 *Tome* v. *Brennan,* No. 01-3372, 2004 U.S. Dist. LEXIS 12193 (E.D. Pa. June 15, 2004).

26 526 U.S. 559 (1999); *see also,* Supreme Ct. Rule 10(b).

This Court has explained that a new law or policy regarding parole will violate the *ex post facto* clause when (1) it is retrospective, and (2) it "disadvantage[s] the offender affected by it."[27] This Court has taken a practical view, asking if the statute or policy has the effect of altering the criteria for review of parole applications in a way that works to the inmate's detriment.[28]

As noted, from 1941 to 1996, the Pennsylvania Parole Act[29] required the Board to balance a number of factors, many of which focused on the inmate's liberty interest in parole described the focus of the Board's inquiry as including such varied factors as the inmate's liberty interests and the risk he might pose to the community. As the Third Circuit noted in *Mickens-Thomas,* the Board had "a philosophy of presumed release."[30]

The 1996 amendment dramatically shifted the focus. The statutory statement of policy provided that parole served a number of functions both for society and the inmate, but that "[i]n providing these benefits to the criminal justice system, the board shall first and foremost seek to protect the safety of the public."[31] As the Third Circuit noted in *Mickens-Thomas,* the earlier iteration of the statute referred not at all to "public safety."[32]

The practical effect of that shifted focus is plain in the statistics. As noted above, in 1991, the Board granted

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27 *Weaver* v. *Graham,* 450 U.S. 24, 29 (1981).

28 *Garner* v. *Jones,* 529 U.S. 244, 256 (2000).

29 61 Pa. Stat. Ann. §§ 331.1, *et seq.*

30 *Id.*

31 61 Pa. Stat. Ann. § 331.1.

32 *See Mickens-Thomas,* 321 F.3d at 377.

parole to 80 per cent of inmates upon the completion of their minimum sentences,[33] while in 1996, the Board granted parole to fewer than 30 per cent of such inmates.[34] *Mickens-Thomas* offers a helpful example. The inmate in that case received a gubernatorial commutation. The Third Circuit noted that 266 persons received such commutations before Mickens-Thomas' application and before the 1996 amendments to the Parole Act, and the Board granted parole to each on the first or second application.[35] Mickens-Thomas sought and was denied parole three times before the Third Circuit's determination in his case.[36]

There is an important federal issue here as to which the Pennsylvania Supreme Court and the Third Circuit are now in direct disagreement, and the Pennsylvania Supreme Court's analysis was mistaken. Mr. Hall does not, of course, know why this Court denied the Board's *certiorari* petition in *Mickens-Thomas* and *Hollawell,* but he notes that his case presents the *ex post facto* issue in a different posture: there is now a well-defined split between the Third Circuit and the Pennsylvania Supreme Court, and the Third Circuit has found the Board non-compliant with the federal remand order in *Mickens-Thomas* so that the Court actually ordered the inmate released.[37] The dispute is deeply rooted and certain to recur.

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33 *See Commonwealth* v. *Stark,* 698 A.2d 1327, 1332 (Pa. Super. 1997).

34 *Id.*

35 *See Mickens-Thomas,* 321 F.3d at 385.

36 *See Mickens-Thomas,* 321 F.3d at 381-82

37 It is inadequate to say merely that inmates like Mr. Hall should file federal *habeas* petitions in district courts that are bound to follow *Mickens-Thomas.* First, such an approach imposes on inmates the constraints of the Antiterrorism and

The issue presented in this case is common among Pennsylvania inmates. As noted above, in just the 10-day period after it decided this case, the Pennsylvania Supreme Court summarily rejected identical claims by five other inmates.

There is, therefore, a direct conflict between the Pennsylvania Supreme Court and the Third Circuit on an important and recurring issue of federal law. This Court should grant Mr. Hall's petition for a writ of *certiorari* to resolve the conflict. *See* Supreme Court Rule 10(b).

B. THE PENNSYLVANIA SUPREME COURT'S ANALYSIS OF THE *EX POST FACTO* ISSUE CONFLICTS WITH THIS COURT'S ANALYSIS IN *GARNER*.

The decision of the Pennsylvania Supreme Court conflicts with this Court's decision in *Garner*. For that independent reason, the Court should grant this petition. *See Hudson* v. *Louisiana* (*certiorari* appropriate when

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Effective Death Penalty Act of 1996, 28 U.S.C. § 2254, which limits an inmate's access to federal courts. Second, such an approach would burden federal district and appellate courts in Pennsylvania with additional litigation made necessary only because the Pennsylvania Supreme Court has established erroneous precedent. Third, so blatant an inconsistency between the federal court of appeals and the state supreme court creates a lack of uniformity in the application of federal law based solely on the judicial system (federal or state) in which the litigant finds himself. Fourth, such inconsistency invites public disrespect for the judicial system.

lower court judgment in conflict with decision of this Court).[38]

The Pennsylvania Supreme Court's analysis of the *ex post facto* issue may be traced to its decision in *Winklespecht.* In that case, the majority held that the 1996 amendments informed the Board's exercise of its discretion and, therefore, could not form the basis for an *ex post facto* violation.[39] In *Finnegan,* the court followed the rationale it employed in *Winklespecht.*[40] In this case, as noted, the Pennsylvania Supreme Court held that it was bound by *stare decisis* to follow its decision in *Winklespecht.*

The question then is whether the Pennsylvania Supreme Court's decision in *Winklespecht* is inconsistent with this Court's decision in *Garner.* The answer is yes. In *Garner,* the Court explained that the presence of discretion does not displace the protections of the *Ex Post Facto* Clause.[41] In a case such as this, where there is a legislative change that modifies the prism through which the Board exercises its discretion, an inmate should be allowed to offer evidence (by statistics or otherwise) to show that the practical implementation of the change will likely cause him to suffer an extended period of incarceration.[42]

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38 450 U.S. 40, 42 (1981); *see also,* Supreme Court Rule 10(c).

39 813 A.2d at 692.

40 838 A.2d at 689. The dissenting justices questioned whether the majority's reliance on the discretionary aspects of parole decisions conflicted with this Court's decision in *Garner.* 838 A.2d at 692 (Saylor, J., dissenting).

41 529 U.S. at 253.

42 529 U.S. at 255.

In *Winklespecht, Finnegan* and in this case, the Pennsylvania Supreme Court ignored the possibility that the inmates could show that the practical effect of the 1996 amendments to the Parole Act would be retroactively to lengthen their terms of imprisonment. Instead, the court seemed to assume that the presence of discretion negated any possible application of the *Ex Post Facto* Clause.

Garner mandates that the inquiry does not end with a facial review of the statute. The court must allow an inmate an opportunity to demonstrate that the practical effect of the rule is to lengthen incarceration:

> [w]hen the rule does not by its own terms show a significant risk [of lengthening periods of incarceration], the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule.[43]

The Pennsylvania Supreme Court ignored that binding requirement established by this Court. The dissenting justices, lead by the Chief Justice of Pennsylvania, explicitly stated that the plurality was ignoring this Court's decision in *Garner*.

The issues raised in this case are not confined to Pennsylvania. Legislatures in many states have amended parole statutes to make more rigorous the standards for release, and courts are frequently and increasingly

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[43] *Id.* The Court then remanded the case to the Eleventh Circuit and the district court to develop the record.

confronting the issue of whether those legislative changes run afoul of the *Ex Post Facto* Clause.[44]

This Court should grant Mr. Hall's petition for a writ of *certiorari* to correct the direct conflict between *Garner* and the Pennsylvania Supreme Court's holding in this case.

C. STATE COURTS ARE DIVIDED ON THE QUESTION OF WHAT DEFERENCE, IF ANY, THEY OWE TO FEDERAL INTERMEDIATE APPELLATE DECISIONS ON FEDERAL QUESTIONS.

Even if the Court chooses not to review the first question presented here, it should consider the second: namely, do state courts owe any deference to interpretations of federal law by federal courts of appeals and, if they do, what is the extent of that deference? It is for this Court to supervise the application of federal law and the interplay between federal and state courts with respect to their application of federal law. *See, e.g., Alden* v. *Maine.*[45]

Under the Judiciary Act of 1789[46] as construed by this Court in *Erie Railroad Co.* v. *Tompkins*[47] and its progeny, federal courts must apply state law as determined by the highest court of the state. In the absence of a

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[44] *See, e.g., Quinlan* v. *Idaho Commission for Pardons and Parole,* 69 P.3d 146 (Idaho 2003), and *John L.* v. *Superior Court,* 91 P.3d 205 (Cal. 2004).

[45] 527 U.S. 706 (1999).

[46] Judiciary Act of 1789, ch. 20, 34; 1 Stat. 73, 28 U.S.C. § 1652.

[47] 304 U.S. 64 (1938).

decision from that court, federal courts must predict what the highest state court would do and, in the process, give due weight to decisions of intermediate state appellate courts.[48]

There is no similar uniformity of approach when state courts interpret federal law. State courts agree that they are bound by this Court's interpretations of federal law.[49] However, state courts vary on the question of whether they are bound by decisions of the federal courts of appeals on federal issues or whether they should even give deference to those federal opinions.[50]

Moreover, those state courts that do not consider themselves bound in all regards – a majority – vary in the deference they give to the determinations of the lower federal courts.[51] For example, the Illinois Supreme Court just this year reiterated its rule that it is bound by lower federal court decisions on interpretations of federal statutes

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[48] *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967).

[49] *See, e.g., State* v. *Tate*, 654 N.W.2d 438, (Wisc. 2002).

[50] *See, e.g., Columbus Chemical and Paper, Inc.* v. *Chamberlin*, 687 So.2d 1143 (Miss. 1996) (state court required to follow federal court of appeals), *Flores* v. *State*, 69 S.W.3d 864 (Ark. 2002) (state court not bound, but finds federal court of appeals' reasoning persuasive); *State* v. *Montano*, 77 P.3d 1246 (Ariz. 2003) (state court not bound); and *People* v. *Dunlap*, 975 P.2d 723 (Colo. 1999) (same).

[51] *See generally*, Donald H. Zeigler, "Gazing into the Crystal Ball: Reflections on the Standards State Judges Should Use to Ascertain Federal Law," 40 WM. & MARY L. REV. 1143 (1999).

but not the U.S. Constitution.[52] Some Michigan courts have explained that they consider themselves bound by interpretations of federal law by the lower federal courts if those courts are in accord with one another.[53] The majority of state courts hold that they are not bound by the decisions of lower federal courts, but that those federal decisions are entitled to significant weight or substantial deference.[54]

In this case, a plurality of the Pennsylvania Supreme Court aligned itself with those state courts that give no deference at all to intermediate federal appellate determinations on federal questions. Mr. Hall had argued that the state court was bound by the determination of the Third Circuit in *Mickens-Thomas,* or that the state court should at least consider that new authority. The Pennsylvania Supreme Court devoted most of its opinion to an analysis of that question, and it ultimately decided that only this Court's interpretations of federal law are binding on state courts:

> Within our federal system of governance, there is only one judicial body vested with the authority to overrule a decision that this Court reaches on a matter of federal law: the United States Supreme Court. Absent a contrary ruling from that tribunal, it is the law of this Commonwealth that application

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[52] *See Borowiec* v. *Gateway 2000, Inc.,* 808 N.E.2d 957 (Ill. 2004); *Busch* v. *Graphic Color Corp.,* 662 N.E.2d 397, 403 (Ill. 1996).

[53] *See People* v. *Riggs,* 568 N.W.2d 101, 106 (Mich. Ct. App. 1997).

[54] *See, e.g., Conrad* v. *Bank of America,* 53 Cal.Rptr.2d 336, 347 (Ct. App. 1996); *Littlefield* v. *State Dept. of Human Services,* 480 A.2d 731, 737 (Me. 1994).

> of the 1996 amendments to the Parole Act to persons sentenced prior to their adoption does not violate the *ex post facto* clause of the United States Constitution.

(App. at 14a-15a) Notably, the Pennsylvania Supreme Court did not discuss in its opinion the substance of the Third Circuit's holding in *Mickens-Thomas,* and it gave no deference at all to the federal court's determination. The Chief Justice of Pennsylvania dissented in an opinion joined by two of his colleagues. While he agreed that the state court was not bound by the Third Circuit's holding, he criticized the plurality's "refusal to consider the reasoning of an inferior federal court on a question of federal law." (App. at 24a)

Federal courts, like state courts, disagree on the question of what deference, if any, state courts owe to decisions of the federal courts of appeals on federal questions.[55]

This Court has never decided the question, although individual Justices have addressed the matter in concurring opinions. Concurring in *Lockhart* v. *Fretwell,* Justice Thomas seemed to take the view that state courts owe no deference to interpretations of federal law by the federal courts of appeals.[56] There is, however, another view. In his concurrence in *Steffel* v. *Thompson,* now-Chief Justice Rehnquist wrote that state courts would not be compelled

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[55] *See, e.g.. United States ex re. Lawrence* v. *Woods,* 432 F.2d 1072, 1075 (CA7 1970) (state courts not bound); *Yniguez* v. *Arizona,* 939 F.2d 727, 736 (CA9 1991) (state courts should consider themselves bound).

[56] 506 U.S. 364, 376 (1993) (Thomas, J., concurring).

to follow legal holdings of the lower federal courts, but that they might find them "highly persuasive."[57]

There is considerable reason to conclude that state courts should give at least due regard to the decisions of the federal courts of appeals on federal issues. Consider this Court's determinations regarding federal-court application of state law. Beginning with *Erie R. Co.* v. *Tompkins*,[58] this Court has interpreted the Rules of Decision Act[59] to require federal courts to give binding effect to interpretations of state law by the state's highest court. In *Bosch,* the Court set out the rule described above: when considering state law, federal courts must follow the decisions of the highest state court and, if there is no such decision, they must predict what that court would do and, in the process, give "proper regard" to intermediate state appellate decisions.[60] The foundation for that principle is the Rules of Decision Act:

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.[61]

That statutory text is no more specific than that of the Constitution's Supremacy Clause:

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57 415 U.S. 452, 482 n.3 (Rehnquist, J., concurring).

58 304 U.S. 64 (1938).

59 28 U.S.C. § 1652 (originally § 34 of the Judiciary Act of 1789).

60 387 U.S. at 464.

61 28 U.S.C. § 1652.

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.[62]

Thus, based on a statute, federal courts give "proper regard" to decisions by intermediate state appellate courts. Despite a constitutional mandate of at least as much specificity as the Rules of Decision Act, many state courts – including the Pennsylvania Supreme Court in this case – consider themselves free wholly to ignore the federal courts of appeals. There is no sound reason for that disparity. This Court has long held that the Supremacy Clause acts as a rule of decision on the state courts.[63] The Court has also explained that federal and state laws together constitute one system of jurisprudence, and that the courts of the two parts of that system are not foreign to one another.

> [T]he Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure. "The laws of the United States are laws in several States, and just as much binding on the citizens and courts thereof as the State laws are. . . . The two together form one system of

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62 U.S. Const., art. VI.

63 *Howlett* v. *Rose*, 496 U.S. 356, 369 n.16 (1990).

> jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent."[64]

In this case, the Pennsylvania Supreme Court considered itself "foreign" to the Third Circuit, unwilling even to consider that Court's reasoning on a matter of federal law. This Court has long held that federal courts owe binding deference to state courts on questions of state law. Equal – and reciprocal – sovereignty demands that the converse be true as well.

The approach taken in this case by the Pennsylvania Supreme Court breeds a lack of uniformity in federal law. Until the Judiciary Act of 1875,[65] the lower federal courts had essentially no original jurisdiction over cases arising under federal law.[66] One of the principal reasons Congress conferred that additional authority on lower federal courts was to provide nationwide uniformity to interpretation of federal law.[67] In his dissent in *Merrell Dow Pharmaceuticals* v. *Thompson,* Justice Brennan likened that quest for uniformity to Justice Story's explanation for the need for this Court to review state court judgments in *Martin* v. *Hunter's Lessee:*[68] "the importance, and even

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64 *Id.* at 367; quoting *Claflin* v. *Houseman*, 93 U.S 130, 136-137 (1876).

65 Ch. 137, § 1, 18 Stat. 470.

66 *See Merrell Dow Pharmaceuticals, Inc.* v. *Thompson,* 478 U.S. 804, 826 (1986) (Brennan, J., dissenting).

67 *Id.*

68 1 Wheat. 304 (1816).

necessity of *uniformity* of decisions throughout the whole United States, upon all subjects within the purview of the constitution."[69] It is true, of course, that, in the absence of a determination by this Court, the federal courts of appeals are free to reach their own interpretations of federal law. However, discord among 12 or 13 federal courts of appeals is a far cry from discord among 12 or 13 federal courts of appeals *and* 50 state courts of last resort. That is especially so since "federal courts have acquired a considerable expertness in the interpretation and application of federal law" while "federal question cases must form a very small part of the business of [state] courts."[70]

As Justice Brennan wrote in *Thompson,* it is no real remedy that this Court has appellate jurisdiction over the state courts because this Court – encumbered by docket pressures, the necessity of deferring to adequate state grounds and related matters – accepts few state-court judgments for review.

This case presents a proper vehicle for examining the issue, in part because of the particular closeness of the result below. With three justices joining in a plurality opinion, three joining in a dissent and one simply concurring in the result, some level of deference to the earlier federal decision might well have been outcome-determinative.

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[69] 1 Wheat. at 347-48 (Story, J.) (emphasis original).

[70] American Law Institute Study of the Division of Jurisdiction Between State and Federal Courts (1969) at 164-165 (*quoted in Thompson,* 478 U.S. at 826 (1986) (Brennan, J., dissenting)).

The Court should take this opportunity to decide the question and bring uniformity to the application of federal law. In the event the Court declines to hold that state courts are bound, it should nonetheless hold that they are required to give substantial deference or "proper regard" to the decisions of the federal courts of appeals.[71]

D. THIS COURT HAS NOT YET DECIDED IF NON-MUTUAL OFFENSIVE COLLATERAL ESTOPPEL MAY BE ASSERTED AGAINST A STATE AND ITS AGENCIES AND THE LOWER COURTS ARE SPLIT ON THE ISSUE.

There is a third issue worthy of this Court's consideration.

Under the rule of collateral estoppel, when a party has had a full and fair opportunity to argue a position, and a court of competent jurisdiction actually and necessarily decides the issue, that determination is conclusive in future litigation involving the same party.[72] Among its goals, collateral estoppel conserves judicial resources and protects

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[71] Professor Zeigler suggests one form that deference could take. *See, supra,* note 51. He suggests that the state courts be required to construe federal law in the same way *Bosch* requires federal courts to construe state law. If this Court has spoken, that holding is binding. If this Court has not, state courts must predict what this Court would do if presented with the question, giving substantial weight to the decisions of the federal courts of appeals on the issue.

[72] *Parklane Hosiery Co.* v. *Shore,* 439 U.S. 322, 326 n.5 (1979).

parties from potentially inconsistent judgments.[73] In *Parklane Hosiery,*[74] the Court approved the use of what is now known as "offensive collateral estoppel."

In this case, the Pennsylvania Board of Probation and Parole was a party before the district court and the Third Circuit in *Mickens-Thomas* (and in a number of subsequent Third Circuit appeals after *Mickens-Thomas* but before the decision in this case). There can be no meaningful dispute that the Board had a full opportunity to be heard on the question of whether its retroactive application of the Parole Act amendments violates the *Ex Post Facto* Clause. Thus, in ordinary circumstances, there would be little question that the Board would be collaterally estopped in this case to challenge the Third Circuit's determination.[75] There would also be a sound policy reason: namely, to preclude a state board that suffered an adverse result in federal court from simply crossing the street to ask a state court to consider the issue as *tabula rasa.*

Notably, since *Mickens-Thomas,* the Board has urged Pennsylvania state courts to ignore the Third Circuit's judgment in that case. For example, just a year

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[73] *See Montana* v. *United States*, 440 U.S. 147, 153-154 (1979).

[74] 439 U.S. 322.

[75] As noted above, since the Third Circuit decided *Mickens-Thomas,* Mr. Hall has consistently urged the Pennsylvania state courts to enforce the federal court's holding. Thus, while he did not expressly refer to collateral estoppel, he sufficiently raised the issue below. *See Haines* v. *Kerner*, 404 U.S. 519, 520 (1972) (per curiam) (*pro se* filings held "to less stringent standards than formal pleadings drafted by lawyers.").

ago, the Board argued in a brief to the Pennsylvania Supreme Court that the Third Circuit's analysis in *Mickens-Thomas* is "deeply flawed" and that the state court "should not follow it." *See* Board's Brief in *Berkelbaugh* v. *Pa. Board of Probation and Parole,* No. 190 MAP 2002 (available on Westlaw at 2003 WL 23623474). Moreover, as noted in *Mickens-Thomas II,* the Board has in at least one case failed to follow the federal court's direction.

In *United States* v. *Mendoza,*[76] the Court recognized an exception to the application of non-mutual offensive collateral estoppel and held that it could not be used against the federal government. The Court held that, when used against the United States, offensive collateral estoppel would require mutuality of the parties.[77] The Court has not, however, decided if the exception recognized in *Mendoza* extends to state or local governments. There is conflict among the federal and state courts on the question.[78] For example, the Eleventh Circuit has extended *Mendoza* to state governments.[79] The Alaska Supreme Court has declined to do so.[80]

This case demonstrates why *Mendoza* should not apply to state and local governments. The Board has had repeated opportunities to make its case in federal district

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[76] 464 U.S. 154 (1984).

[77] 464 U.S. at 158.

[78] *See, generally,* Note, "Nonmutual Issue Preclusion Against States," 109 HARV. L. REV. 792 (1996).

[79] *See, e.g., Hercules Carriers, Inc.* v. *Claimant State of Florida,* 768 F.2d 1558, 1579 (CA11 1985) (applying *Mendoza* to the State of Florida).

[80] *State* v. *United Cook Inlet Drift Ass'n,* 895 P.2d 947 (Alaska 1995) (*Mendoza* not applicable to State of Alaska).

courts and the Third Circuit. The Board lost, but it has nonetheless repeatedly urged Pennsylvania state courts to flout the federal judgments against it (and, in this case, the Pennsylvania Supreme Court gave the Board license to do that). The Board's refusal to accept the Third Circuit's reasoned judgment runs counter not just to the rules of collateral estoppel but to the Supremacy Clause.

Indeed, the Supremacy Clause provides as least one reason for distinguishing cases involving state and local governments from *Mendoza*. In that case, the Court focused on the large number of cases to which the federal government is a party. State and local governments confront far fewer lawsuits than does the federal government. Moreover, the Supremacy Clause mandates that states defer to federal authority. The Board did not do so in this case.

Having received a determination from the Third Circuit that it did not like, the Board simply argued the issue afresh in the state courts and urged those courts to ignore the federal decision. Collateral estoppel should bar such flagrantly inconsistent positions.

The Court has yet to resolve the question of *Mendoza*'s applicability to state and local governments, and the lower federal courts treat the question differently.[81] The Court should accept this case to resolve the question.

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[81] The Court has held that the collateral-estoppel effect of federal judgments in state courts is a question of federal law. *See Heck* v. *Humphrey*, 512 U.S. 477, 488 n.9 (1994).

CONCLUSION

The Court should grant this petition for a writ of *certiorari* to consider the three questions presented.

August 6, 2004

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APPENDIX

A Opinion of the Supreme Court of Pennsylvania in *Hall* v. *Pennsylvania Board of Probation and Parole,* No. 40 EAP 2002 (June 22, 2004)..... 2a

B Order of the Commonwealth Court of Pennsylvania in *Hall v. Pennsylvania Board of Probation and Parole,* No. 458 M.D. 2002 (November 21, 2003)..... 24a

C Determination of the Pennsylvania Board of Probation and Parole (June 13, 2002)..... 27a

D Determination of the Pennsylvania Board of Probation and Parole (Oct. 28, 2002)..... 29a

E Text of constitutional and statutory provisions at issue..... 31a

APPENDIX A

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

BRYAN P. HALL,	:	*No. 40 EAP 2002*
	:	
Appellant	:	
	:	
v.	:	
	:	
PENNSYLVANIA BOARD OF PROBATION AND PAROLE,	:	
	:	
Appellee	:	

Submitted: July 9, 2003

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

DECIDED: June 22, 2004

Bryan P. Hall (Hall) appeals from an Order of the Commonwealth Court, which dismissed his *pro se* Petition for Review in the Nature of Mandamus, brought in the original jurisdiction of the Commonwealth Court. Hall contends that the Pennsylvania Board of Probation and Parole (Board) improperly denied his numerous requests for parole by judging his applications pursuant to standards enacted in 1996, five years after his date of sentence. For the reasons discussed herein, we affirm the Order of the Commonwealth Court.

FACTS AND PROCEDURAL HISTORY

Hall is currently serving a prison sentence of four to twenty years at the State Correctional Institution in Dallas, Pennsylvania, for convictions of aggravated assault,[1] aggravated indecent assault,[2] and related charges stemming from his arrest on June 26, 1991. Hall, who has been incarcerated since his arrest, had a minimum sentence date of June 28, 1995, and a maximum sentence date of June 28, 2011. He appeared before the Board on May 24, 1995, in anticipation of the expiry of his minimum sentence term. In a decision dated June 13, 1995, the Board denied parole based on the following factors: (1) substance abuse; (2) habitual offender; (3) assaultive instant offense; (4) very high assaultive behavior potential; (5) the need for treatment; (6) failure to benefit from treatment programs for sex offenders or substance abuse; and (7) an unfavorable recommendation from the Department of Corrections. Reproduced Record (R.R.) at A-1. The Board informed Hall that to improve his parole candidacy he: (1) must participate in prescriptive programs; (2) maintain a clear conduct record; and (3) earn an institutional recommendation from the Department of Corrections. Id.

From 1996 through 1998, on an annual, Hall appeared before the Board, which rejected his parole requests, citing itemized reasons and indicators that it would review at his next parole hearing. Id. at A-2, A-3, A-4. Hall again appeared before the Board on March 11, 1999. Again, the Board denied parole, this time explaining that "following an interview and review of your file, the Pennsylvania Board of Probation and Parole has determined that the

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1 18 Pa.C.S. § 2702.

2 18 Pa.C.S. § 3125.

mandates to protect the safety of the public and to assist in the fair administration of justice cannot be achieved through your release on parole." Id. at A-5. The Board used the same language in a decision denying parole filed in 2000. Id. at A-6. The Board supported its parole denials on April 10, 2001, and June 13, 2002, with the following language: "following an interview and review of your file, the Pennsylvania Board of Probation and Parole has determined that the fair administration of justice cannot be achieved through your release on parole." Id. at A-7, A-8.

On July 9, 2002, Hall filed a *pro se* Petition for Review in the nature of a request for *mandamus* in the original jurisdiction of the Commonwealth Court. Hall contended that the 1996 amendments to the Parole Act[3] materially changed the criteria for granting and denying parole, and that application of the amended Parole Act to his parole requests violated the constitutional prohibition against *ex post facto* laws. Specifically, Hall contended that the 1996 amendments shifted the policy statement of the Board from one that recognized the "value of parole as a disciplinary and corrective influence and process" to one that emphasizes the protection of public safety. 61 P.S. § 331.1 (1995 and 2003). The Board sought a stay of the matter pending the Commonwealth Court's disposition of *Reynolds v. Pennsylvania Board of Probation and Parole,* 809 A.2d 426 (Pa. Cmwlth. 2002). The Commonwealth Court decided Reynolds on October 21, 2002, rejecting similar arguments to those presented *sub judice.*

On October 28, 2002, while the Commonwealth Court

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[3] Act of August 6, 1941, P.L. 861, as amended, 61 P.S. §§ 331.1 - 331.34a.

proceedings were stayed, the Board modified its June 13, 2002 decision to deny parole to read as follows:

> Following an interview with you and a review of your file, and having considered all matters required pursuant to the Parole Act of 1941, as amended, 61 P.S. § 331.1 et seq., the Board of Probation and Parole, in the exercise of its discretion, has determined at this time that: your best interests do not justify or require you being paroled/ reparoled; and, the interests of the Commonwealth will be injured if you were paroled/reparoled. Therefore, you are refused parole/reparole at this time. The reasons for the Board's decision include the following:
>
> The recommendation made by the prosecuting attorney.
>
> Reports, evaluations and assessments concerning your physical, mental and behavior condition and history.
>
> Other factors deemed pertinent in determining that you should not be paroled: your prior criminal history.

R.R. at A-9. On November 26, 2002, relying on Reynolds, the Commonwealth Court denied the Petition for Review filed by Hall. Hall now appeals to this Court, contending that application of the 1996 amendments to the Parole Act to his parole requests operated in contravention of the prohibition of the *ex post facto* clause contained in the United States Constitution. U.S. CONST. Art. I § 10 ("no state shall . . . pass any . . . *ex post facto* law").

DISCUSSION

Though the claims herein presented by Hall concern application of the Parole Act, the resolution of this matter turns on the principles of separation of powers and *stare decisis*, rather than the substantive arguments raised by Hall.

Just last year, in *Winklespecht v. Pennsylvania Board of Probation and Parole,* 571 Pa. 685, 813 A.2d 688 (Pa. 2002), this Court was faced, *inter alia*, with the exact question Hall presents today: does application of the newly-amended Parole Act to an inmate sentenced prior to the promulgation of those amendments violate the *ex post facto* clause of the United States Constitution?[4] Although we filed *Winklespecht* as a fractured Opinion Announcing the Judgment of the Court, at least three Justices agreed that there was no *ex post facto* violation. *See id.* at 691-692 ("the rewording of 61 P.S. § 331.1 did not create a substantial risk that parole would be denied any more frequently than under the previous wording, nor did the addition of this language create a new offense or increase the penalty for an existing offense") (Opinion Announcing the Judgment of the Court per Eakin, J.); *id.* at 693 ("I fully agree . . . with the lead opinion's conclusion that the constitutional *ex post facto* claim raised here . . . is entirely meritless") (Castille, J., concurring, joined by Newman, J.);

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[4] Walter Winklespecht was convicted and sentenced in 1988 for rape, involuntary deviate sexual intercourse, and aggravated assault. The trial court sentenced him to seven to twenty years' imprisonment and a consecutive term of five years' probation.

id. at 697.[5] However, subsequently, a clear majority of this Court explicitly held that application of the 1996 amendments to the Parole Act to individuals incarcerated prior to the effective date of those amendments did not violate the *ex post facto* clause. *Finnegan v. Pennsylvania Board of Probation and Parole,* 576 Pa. 59, 838 A.2d 684 (Pa. 2003).[6]

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[5] Mr. Chief Justice Emeritus Zappala, Mr. Chief Justice Cappy, and Mr. Justice Nigro did not express any opinion on whether application of the 1996 amendments to the parole request of Winklespecht violated the *ex post facto* clause. Mr. Justice Saylor, while not expressing a definitive view on the issue, stated: "while the statutory changes may have placed particular emphasis on . . . considerations [such as public safety and the fair administration of justice], any conclusion that there is a substantial risk of prolonging incarceration sufficient to offend *ex post facto* prohibitions would appear to be based on mere conjecture." *Winklespecht,* 813 A.2d at 697 (Saylor, J., concurring and dissenting).

[6] Mr. Justice Eakin authored the majority opinion in Finnegan, which Messrs. Justice Castille and Lamb, and myself, joined. The dissent makes it a point to de-emphasize the precedential value of *Finnegan* because of *Finnegan*'s reliance on the plurality opinion in *Winklespecht.* Nevertheless, four justices in *Finnegan* agreed that application of the 1996 amendments to the Parole Act to persons sentenced prior to the amendments does not violate the *ex post facto* clause and, therefore, whether or not the Court erred in counting a majority in *Winklespecht* is of no moment because there is a clear majority in Finnegan. *See Finnegan,* 838 A.2d at 690 ("we reiterate that the 1996 revision of . . . the Parole Act does not violate the *ex post facto* clause when applied to a prisoner convicted prior to the revision").

All alleged counting errors aside, we have considered and flatly rejected the arguments raised by the dissent concerning application of *Garner v. Jones,* 529 U.S. 244, 146 L. Ed. 2d 236,

Seven weeks after *Winklespecht*, on February 21, 2003, the United States Court of Appeals for the Third Circuit, faced with an identical substantive contention, decided *Mickens-Thomas v. Vaughn,* 321 F.3d 374 (3d Cir. 2003). The Third Circuit rejected the determination of this Court in *Winklespecht*, finding instead that applying the 1996 amendments to *Mickens-Thomas*, who had been sentenced in 1969, violated the *ex post facto* prohibition. The Third Circuit found that parole policy in the Commonwealth shifted after 1996, which calculably lessened the chances that an inmate would be paroled. The Third Circuit reasoned as follows:

> Prior to 1996, the Board's concern for potential risks to public safety could not be the sole or dominant basis for parole denial under the existing Guidelines. Considerations of public safety were already incorporated into its Guidelines analysis; the Board had to point to "unique" factors as a basis for its rejection of the Guidelines. Moreover, the Board had to weigh all factors, militating for and against parole, and make its decision on the totality of the factors pertinent to parole, and give appropriate weight to the interests of the inmate. Heavy foot application on one factor could not have been the basis of granting or rejecting parole. Policy declarations in and after 1996 demonstrate that

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120 S. Ct. 1362 (2000), and *California Department of Corrections v. Morales,* 514 U.S. 499, 131 L. Ed. 2d 588, 115 S. Ct. 1597 (1995). *See Finnegan*, 838 A.2d at 688. In resurrecting these arguments, regrettably, the dissent attempts to revive the substantive dispute that has been settled definitively by a majority of this Court. In spite of these efforts, we refuse to alter the purely jurisprudential nature of this decision.

> Board stance shifted and that, indeed, post-1996 considerations of public safety became the dominant concern of the Board

Id. at 386. The Third Circuit has reaffirmed its position on at least two subsequent occasions: *Hollawell v. Gillis*, 65 Fed. Appx. 809 (3d Cir. 2003) (memorandum), *cert. denied*, 157 L. Ed. 2d 136, ___ U.S. ___, 124 S. Ct. 229 (October 6, 2003), and *McLaurin v. Larkins*, 76 Fed. Appx. 415 (3d Cir. 2003) (memorandum).[7] Hall recognized this divergence in legal authority when he asked us to consider his appeal in light of *Mickens-Thomas*. Accordingly, given our rejection of the *ex post facto* argument in *Winklespecht*, as clarified by *Finnegan*, at this juncture our concern is no longer a question of whether there is an *ex post facto* violation, but whether we are constrained by *Mickens-Thomas*.

It is beyond cavil that this Court is bound by the determinations of the United States Supreme Court on issues of federal law, including the construction and interpretation of the federal constitution. *Purple Orchid, Inc. v. Pennsylvania State Police*, 572 Pa. 171, 813 A.2d 801, 806 (Pa. 2002) (citing *Pennsylvania State Police, Bureau of Liquor Control Enforcement v. Hospitality Investments of Philadelphia, Inc.*, 547 Pa. 142, 689 A.2d 213, 216 (Pa. 1997)). However, whether or not this Court has a responsibility to adhere to the pronouncements of inferior federal courts on matters of federal law, where the United States Supreme Court has not spoken, is less certain. There appear to be four schools of thought on this question: (1) a decision of an inferior federal court should

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[7] In a footnote in *McLaurin*, the Third Circuit noted that *certiorari* is pending in *Mickens- Thomas*. *McLaurin*, 76 Fed. Appx. 415 at *2 n.3.

be treated as persuasive, but not binding, authority; (2) a decision of an inferior federal court should be followed, if reasonably possible, to avoid a conflict between state and federal resolutions of the same question; (3) a decision of an inferior federal court binds the state court; and (4) if the decisions of the inferior federal courts are "numerous and consistent," the state court must follow their dictates.

A vast majority of state supreme courts that have addressed this issue have adopted the first approach. *See, e.g., Totemoff v. State,* 905 P.2d 954 (Alaska 1995), cert. denied, 517 U.S. 1244, 135 L. Ed. 2d 190, 116 S. Ct. 2499 (1996); *Custom Microsystems, Inc. v. Blake*, 344 Ark. 536, 42 S.W.3d 453 (Ark. 2001); *Hill v. Thomas*, 973 P.2d 1246 (Colo. 1999), *affirmed*, 530 U.S. 703, 147 L. Ed. 2d 597, 120 S. Ct. 2480 (2000); *Macon- Bibb County Hospital Authority v. National Treasury Employees Union*, 265 Ga. 557, 458 S.E.2d 95 (Ga. 1995); *Indiana Department of Public Welfare v. Payne,* 622 N.E.2d 461 (Ind. 1993); *Shell Oil Company v. Secretary, Revenue and Taxation,* 683 So. 2d 1204 (La. 1996); *ACE Property Casualty and Insurance Co. v. Commissioner of Revenue*, 437 Mass. 241, 770 N.E.2d 980 (Mass. 2002);[8] *State v. Rybin,* 262 Neb. 77, 628

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[8] *But see Commonwealth v. Masskow,* 362 Mass. 662, 290 N.E.2d 154 (Mass. 1972). In *Masskow*, the Supreme Judicial Court of Massachusetts noted the general rule that decisions of federal appeals courts are persuasive, but that "it would be undesirable . . . to affirm the conviction of a defendant if the inevitable consequence were that he would be released on a writ of habeas corpus." *Id.* at 157. Accordingly, without deciding the issue, for purposes of the case, the Supreme Judicial Court of Massachusetts assumed that the federal appeals court "accurately stated the federal law." *Id.* Ultimately, however, the *Masskow* Court did not follow the federal precedent, finding the case distinguishable on its facts.

N.W.2d 272 (Neb. 2001); *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 577 A.2d 1239 (N.J. 1990); *Custom Cabinet Factory of New York, Inc. v. Eighth Judicial District Court ex rel. County of Clark*, 62 P.3d 741 (Nev. 2003); *Bogart v. CapRock Communications Corp.*, 2003 OK 38, 69 P.3d 266 (Okla. 2003); *State v. Austin*, 165 Vt. 389, 685 A.2d 1076 (Vt. 1996); *Elections Board of State of Wisconsin v. Wisconsin Manufacturers & Commerce*, 227 Wis. 2d 650, 597 N.W.2d 721 (Wis. 1999), *cert. denied*, 528 U.S. 969, 145 L. Ed. 2d 318, 120 S. Ct. 408 (1999).

At least two jurisdictions give slightly more deference to the federal appeals court of the circuit where the state is located. *Red Maple Properties v. Zoning Commission*, 222 Conn. 730, 610 A.2d 1238, 1242 n.7 (Conn. 1992) ("It would be a bizarre result if this court [adopted one analysis] when in another courthouse, a few blocks away, the federal court, being bound by the Second Circuit rule, required [a different result]"); *Littlefield v. State, Department of Human Services*, 480 A.2d 731, 737 (Me. 1994) ("even though only a decision of the Supreme Court of the United States is the supreme law of the land on a federal issue . . . nevertheless, in the interests of existing harmonious federal-state relationships, it is a wise policy that a state court of last resort accept, so far as reasonably possible, a decision of its federal circuit court on such a federal question").

Mississippi and New Hampshire hold that they are constrained by the interpretations of federal law forwarded by the Fifth and First Circuits, respectively. *Columbus Chemical and Paper, Inc. v. Chamberlin*, 687 So. 2d 1143 (Miss. 1996); *Desmarais v. Joy Manufacturing Co.*, 130 N.H. 299, 538 A.2d 1218 (N.H. 1988). Finally, Alabama,

California, and Illinois will consider themselves bound by interpretations of inferior federal courts, but only where the decisions of those courts are "numerous and consistent." *Etcheverry v. Tri-Ag Service, Inc.*, 22 Cal. 4th 316, 93 Cal. Rptr. 2d 36, 993 P.2d 366, 368 (Cal. 2000).[9] *See also Ex Parte Bozeman*, 781 So. 2d 165 (Ala. 2000), *affirmed*, 533 U.S. 146, 150 L. Ed. 2d 188, 121 S. Ct. 2079 (2001), and *Bishop v. Burgard*, 198 Ill. 2d 495, 764 N.E.2d 24, 261 Ill. Dec. 733 (Ill. 2002).

Almost forty years ago, we were faced with the same question of whether and how to consider the interpretations of inferior federal courts on matters of federal law when we decided *Commonwealth v. Negri*, 419 Pa. 117, 213 A.2d 670 (Pa. 1965). In *Negri*, the question we intended to answer was whether we should adhere to our interpretation of *Escobedo v. Illinois*, 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964) (predecessor to *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966)), or the conflicting analysis followed by the Third Circuit Court of Appeals. We recognized the problem inherent in interpreting federal law in a manner inconsistent with the reasoning advanced by the Third Circuit Court of Appeals, explaining that:

> If the Pennsylvania courts refuse to abide by [the Third Circuit's] conclusions, then the individual to whom we deny relief need only to "walk across the

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[9] *But see People v. Bradford*, 15 Cal. 4th 1229, 65 Cal. Rptr. 2d 145, 939 P.2d 259 (Cal. 1997), *cert. denied*, 523 U.S. 1118, 140 L. Ed. 2d 937, 118 S. Ct. 1796 (1998) (viewing the decisions of federal courts of appeal as persuasive, but not binding authority).

> street" to gain a different result. Such an unfortunate situation would cause disrespect for the law. It would also result in adding to the already burdensome problems of the Commonwealth's trial courts, which look to us for guidance. Finality of judgments would become illusory, disposition of litigation prolonged for years, the business of the courts unnecessarily clogged, and justice intolerably delayed and frequently denied.

Negri, 213 A.2d at 672. Ultimately, however, this rationale for applying Third Circuit precedent was rendered mere *dictum* because we determined that Escobedo was not retroactive and, therefore, avoided choosing between the two alternatives. *Id.* at 676.[10]

More recently, in a number of decisions, this Court has clearly indicated that we are not obligated to follow the decisions of the Third Circuit on issues of federal law. *See, e.g., Commonwealth v. Cross*, 555 Pa. 603, 726 A.2d 333 (Pa. 1999) (this Court not bound by a Third Circuit decision interpreting United States Supreme Court jurisprudence); *Commonwealth v. Ragan*, 560 Pa. 106, 743 A.2d 390 (Pa. 1999) (this Court is not constrained by a Third Circuit decision interpreting federal law); *Commonwealth v. Chester*, 557 Pa. 358, 733 A.2d 1242 (Pa. 1999) (same); *Commonwealth v. Laird*, 555 Pa. 629, 726 A.2d 346 (Pa. 1999) (same). Similarly, as early as

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10 One year after *Negri*, the United States Supreme Court, in *Johnson v. New Jersey*, 384 U.S. 719, 16 L. Ed. 2d 882, 86 S. Ct. 1772 (1966), approved the Third Circuit's approach and, accordingly, we conceded to the federal interpretation in *Commonwealth ex rel. Wilkes v. Maroney*, 423 Pa. 113, 222 A.2d 856, 858- 859 (Pa. 1966), and *Commonwealth v. Senk*, 423 Pa. 129, 223 A.2d 97, 99 (Pa. 1966).

1962, we held that we are not bound by the decisions of other federal Circuit Courts of Appeal. *Breckline v. Metropolitan Life Insurance Co.*, 406 Pa. 573, 178 A.2d 748 (Pa. 1962) (Ninth Circuit ruling on federal question does not bind this Court).

While we recognize the concerns articulated in *Negri* regarding conflicting interpretations of federal law by this Court and the Third Circuit, we must reaffirm our *Winklespecht/Finnegan* analysis. As a foundational matter, the cited portion of *Negri* was dicta, and in the intervening period, this Court, as well as most other state courts, have determined that they are not bound by the decisions of inferior federal courts. Further, if we were to relent from our newly announced positions merely because the Third Circuit, or any other inferior federal court, has reached a conflicting resolution, we would breed the same disrespect for the law, the concern over which we articulated in *Negri*. To follow this path, would render illusory the finality of judgments within our Commonwealth. Therefore, rather than reversing the position we took one year ago; we believe that it is more jurisprudentially sound to confirm our prior decision.

Within our federal system of governance, there is only one judicial body vested with the authority to overrule a decision that this Court reaches on a matter of federal law: the United States Supreme Court. Absent a contrary ruling from that tribunal, it is the law of this Commonwealth that application of the 1996 amendments to the Parole Act to persons sentenced prior to their adoption does not violate the *ex post facto clause* of the United States Constitution.

CONCLUSION

For the reasons discussed above, we affirm the Order of the

Commonwealth Court.

Mr. Justice Baer concurs in the result.

Mr. Chief Justice Cappy files a dissenting opinion in which Messrs. Justice Nigro and Saylor join.

MR. CHIEF JUSTICE CAPPY, dissenting.

Like the majority, I agree that a decision of an inferior federal court should be treated by this court as persuasive, but not binding, authority, where that decision interprets federal law. I, however, recognize that the decisions of the United States Supreme Court on such matters are controlling. Unlike the majority, therefore, I would find that the decision of the Third Circuit Court of Appeals on the *ex post facto* question involved in this case, in adhering to recent pronouncements of the High Court, is persuasive in its interpretation of federal law. Accordingly, I am compelled to dissent.

At issue here is the retroactive application of the 1996 amendments to the Parole Act[1] and whether applying those provisions to a person sentenced prior to 1996 violates the *ex post facto* clause of the United States Constitution. Appellant has been in prison since 1991. The heart of Appellant's argument is that in all probability under the parole system as it existed at the time he committed his offense, was convicted, and sentenced, he would have been paroled, while under the current system he is ineligible for parole. Appellant points to the amendments to the 1996 Parole Act that he asserts altered the focus of the parole

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[1] The specific provision at issue is found at 61 P.S. § 331.1.

policy in Pennsylvania from one that centered on the rehabilitation of the offender to one that now emphasizes public safety, deterrence, and the incapacitation of criminals. Appellant asserts that the retroactive application of the policy created through the 1996 amendments to his application for parole causes him to suffer a longer period of incarceration than if his parole application were considered under the pre-1996 policy, thereby creating an *ex post facto* violation.

This exact argument was presented, and rejected by our court in two recent decisions, *Winklespecht v. Pa. Bd. Probation and Parole*, 571 Pa. 685, 813 A.2d 688 (Pa. 2002) and *Finnegan v. Pa. Bd. Probation and Parole*, 576 Pa. 59, 838 A.2d 684 (Pa. 2003). Before discussing the specifics of those two cases, however, I believe a brief review of the United States Supreme Court decisions in *California Department of Corrections v. Morales*, 514 U.S. 499, 131 L. Ed. 2d 588, 115 S. Ct. 1597 (1995) and *Garner v. Jones*, 529 U.S. 244, 146 L. Ed. 2d 236, 120 S. Ct. 1362 (2000) is warranted. In each of those cases, the Court was faced with an argument that a decrease in the frequency of scheduled parole hearings constituted an *ex post facto* violation as to the prisoners sentenced under the prior scheme. In *Morales*, the changes occurred via statutory enactment; while in *Garner*, the change in frequency of parole hearings was accomplished through the exercise of the parole board's legitimate discretion. In each case, based on the specific facts presented, the Court found no *ex post facto* violations. However, the critical points made in those cases are first, that retroactive changes in the laws governing parole **may** violate the *ex post facto* clause; and second, that the test for determining if such a violation has occurred is "whether retroactive application of the change in law created a significant risk of increased punishment."

Garner, at 256. With these important points in mind, we return to a consideration of the case law as it developed in our court.

Winklespecht was a plurality opinion. The Appellant had presented his *ex post facto* challenge to the denial of his parole application by bringing a petition for the writ of *habeas corpus*. The court was presented with two questions, whether a writ of *habeas corpus* was the correct means to challenge the denial of parole, and whether Appellant had suffered an *ex post facto* violation. Three of the justices agreed that the 1996 amendments to the Parole Act did not violate the *ex post facto* clause. The opinion announcing the judgment of the court (OAJC) reasoned that although the 1996 amendments added new language, the alteration in wording did not create a change in the concepts considered by the parole board when exercising its discretion over an application for parole. According to the OAJC, a reordering of the considerations necessary to resolve an application for parole could not result in an *ex post facto* violation. 813 A.2d at 691-92. Two justices concurred in the result without opinion. I authored a short opinion concurring in result only. I agreed with dismissing the writ of *habeas corpus* as I believed that a writ of *mandamus* was the correct method for challenging a denial of parole; and that resolution of the case should have ended short of a discussion on the merits of the *ex post facto* claim. *Id.* at 692. Justice Castille concurred in the OAJC, with the exception that he believed a *habeas* petition to the trial court would be the best means to adjudicate consitutional challenges to a denial of parole. *Id.* at 693. Justice Saylor authored a concurring and dissenting opinion. In sum, he agreed that there was no facial violation of the *ex post facto* clause and that Appellant could not establish a constitutional violation without pleading and

proving that the new guidelines effected a change in the rate at which prisoners were paroled. *Id.* at 700. However, in the portion of his opinion concurring in the result, Justice Saylor, viewing the *ex post facto* claim in light of the decisions in *Morales* and *Garner*, stated that he would not go as far as the OAJC, leaving open the possibility that a prisoner could meet the burden of demonstrating an *ex post facto* violation through the application of the 1996 amendments in a specific case. *Id.* at 697.

Following this court's decision in *Winklespecht*, the Third Circuit Court of Appeals addressed the identical issue in *Mickens-Thomas v. Vaughn*, 321 F.3d 374 (3d Cir. 2003) and reached the opposite conclusion than did the plurality on the *ex post facto* question. The *Mickens - Thomas* court did not view the 1996 amendment to the Parole Act as simply reordering policy considerations that had always been reviewed by the parole board, but rather, found the change in language in the 1996 amendments to signal a change in the weight to be afforded those policy concerns within the deliberative process of considering an application for parole. *Id.* at 385. Although the Circuit Court did have the benefit of the recent pronouncement of this court in *Winklespecht*, the court did not consider that case dispositive in its analysis of Mr. Mickens-Thomas' *ex post facto* claim. Focusing on the critical points established by the United States Supreme Court in the *Morales* and *Garner* decisions, the court concluded that the change in emphasis in the parole process could create a significant risk of prolonged incarceration. Accepting the premise that an *ex post facto* violation may occur through application of the amended parole policy guidelines to a prisoner sentenced before the adoption of the 1996 amendments, the court then turned to the specific circumstances in Mr. Mickens-Thomas' case. Specifically the court looked at the

emphasis by the parole board on public safety as a paramount consideration in denying the application for parole. In the court's view, the concern for public safety eclipses other factors in weight after the 1996 amendment. Thus, if the application for parole had been reviewed prior to the amendment, when public safety was not so heavily emphasized, it was more likely than not that parole would have been granted on the facts of this case. Accordingly, the court concluded that Mr. Mickens-Thomas had established a substantial likelihood of an increase in the period of his incarceration because of the policy changes. The case was then remanded to the parole board to reconsider the application for parole in light of the Circuit Court's observations regarding the *ex post facto* claim.[2]

A short time after the decision in *Mickens-Thomas*, this court again visited the question of *ex post facto* challenges to the denial of parole in the case of *Finnegan*. The appellant in that case presented his claim through a writ of *mandamus*. A majority of the court agreed that *mandamus* was the proper vehicle to bring a constitutional challenge to the denial of parole. *Id.* at 687. Then, reaching the merits of the constitutional *ex post facto* claim the majority found that the amendments did not alter the criteria the parole

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2 On remand the board again denied the application for parole. The matter was again brought to the Third Circuit Court of Appeals where the petition for *habeas* relief was granted and the board was ordered to release Mr. Mickens-Thomas on parole, as the court found an *ex post facto* violation had occurred. *Mickens-Thomas v. Vaughn*, 355 F.3d 294 (2004). Although one could question the Third Circuit's conclusion that an ex *post facto* violation had been established on the facts presented, it cannot be contested that the Third Circuit applied the correct legal standard in reaching its conclusion.

board used in exercising its discretion on parole applications. *Id.* at 688. The majority firmly stated that a change in policy guiding the discretion of the parole board can never support a claim of an *ex post facto* violation in the denial of parole. *Id.* at 690. As for the decision in *Mickens-Thomas*, the *Finnegan* court distinguished that case on the basis of the distinctive factual assertions made by the litigants to support their claims of an ex *post facto* violation in the two cases:

Mickens-Thomas concerned the issue of greater emphasis being given to the public safety factor in the parole decision, whereas public safety was not even a factor mentioned as a basis for the denial of parole in appellant's case. Thus, we are not bound by the Third Circuit's decision. *Id.*, at 689.

Justice Saylor authored a dissent in *Finnegan*, joined by myself, and Justice Nigro. The primary point of dissonance between the dissent and majority was on the question of whether an *ex post facto* claim may arise from a change in parole guidelines. The majority definitively stated that "the *ex post facto* clause does not apply to the parole guidelines. . ." *Id.* at 690. The dissent disputed that holding, pointing out that the underlying issue was one controlled by federal law, and reminding the majority that in *Garner*, the United States Supreme Court unmistakably recognized that the *ex post facto* clause bars retroactive changes in parole policies that create a substantial risk of prolonging a prisoner's incarceration. The dissenting Justices favored a remand to allow for a hearing to consider *Finnegan*'s statistical evidence that a systematic change in parole policies following implementation of the 1996 amendments created a significant risk of prolonged incarceration, in support of

his *ex post facto* claim.

In the case at bar, the majority recognizes that tension exists between the decisions of this court in the recent opinions of *Winklespecht* and *Finnegan*, and the concurrent pronouncement of the Third Circuit Court of Appeals in *Mickens-Thomas*. The majority summarily rejects the decision in *Mickens-Thomas*. It is the kernel of reasoning upon which the federal and state opinions on this question diverge that causes me to reject the analysis of the majority. The ultimate question of whether a change in parole policy that creates a substantial risk of prolonging incarceration may constitute an *ex post facto* violation has been answered in the affirmative by the United States Supreme Court. *Garner; Morales*.

What the majority herein is missing is that the decisions by this court in *Winklespecht* and *Finnegan* fail to accept and comport with the holdings of the United States Supreme Court on the question of whether parole policy changes can provide a legitimate basis to assert an *ex post facto* violation. The majority now compounds that mistake by its blanket refusal to consider the reasoning employed by the Third Circuit in *Mickens-Thomas*. The critical point is that a change in parole policy as applied to a person sentenced under the previous policy can in fact create an increase in that person's period of incarceration and that any individual prisoner has the right to mount such a challenge. Whether the prisoner can demonstrate that a violation has occurred, and that he in fact faces a significant risk of an increase in punishment by application of the new policy, is a question of proof.

By rejecting the Third Circuit's opinion in *Mickens-Thomas*, the majority in this instance repeats the original

error committed by our court in *Winklespecht* and Finnegan.[3] Further the majority reaches its conclusion by

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[3] I recognize that *Finnegan* is a recent majority decision of this court and under the doctrine of *stare decisis* it would ordinarily be entitled to adherence as precedential authority. However, this court has never uncritically employed the concept of *stare decisis* to perpetuate error, particularly in the constitutional arena, where the Legislature cannot correct any error we make. See generally *Hohn v. United States*, 524 U.S. 236, 251, 118 S. Ct. 1969, 1977, 141 L. Ed. 2d 242 (1998) ("Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress is free to alter what we have done.") (internal quotation marks omitted). As I firmly believe the opinion in Finnegan erroneously fails to follow binding federal authority, I do not believe we should continue to perpetuate that error by hiding behind a judicial doctrine. See, e.g., *Hack v. Hack*, 495 Pa. 300, 433 A.2d 859, 867-68 (Pa. 1981) (abolished doctrine of interspousal immunity and recognized that "this court has full authority, and the corresponding duty to examine its precedents to assure that a rule previously developed is not perpetuated when the reason for the rule no longer exists and application of the rule would cause injustice"); *Mayle v. Pennsylvania Department of Highways*, 479 Pa. 384, 388 A.2d 709, 720 (Pa. 1978) (abolished doctrine of sovereign immunity and recognized that "*stare decisis* should not be invoked to preserve a rule of law when [there is] no better reason for [it] than [that] is was laid down in the time of Henry IV"); *Mayhugh v. Coon*, 460 Pa. 128, 331 A.2d 452, 456 (Pa. 1975) ("the doctrine of *stare decisis* was never intended to be used as a principle to perpetuate erroneous principles of law"); *Ayala v. Philadelphia Board of Public Education*, 453 Pa. 584, 305 A.2d 877, 887-89 (Pa. 1973), ("the doctrine of *stare decisis* is not a vehicle for perpetuating error, but rather a legal concept which responds to the demands of justice, and thus, permits the orderly growth processes of law to flourish"); *Olin Mathieson Chemical Corp.*

blindly applying the policy statement as to the impact of inferior federal case law on the decision-making of this tribunal. Although I agree with the majority that decisions of inferior federal courts are not binding on this court, and will merely be looked to as potentially persuasive authority on questions of federal law, my problem is that the majority fails to apply that principle in this case. The majority fails to consider the reasoning of the inferior federal court before summarily rejecting it.

I must dissent from the majority's refusal to consider the reasoning of an inferior federal court on a question of federal law. Furthermore, I dissent as I believe the decisions in *Winklespecht* and *Finnegan* are in error as they ignore the holdings of the United States Supreme Court in

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v. White Cross Stores, Inc., 414 Pa. 95, 199 A.2d 266, 268 (Pa. 1964), ("While it is true that great consideration should always be accorded precedent, especially one of long standing and general acceptance, it doesn't necessarily follow that a rule established by precedent is infallible. . . . If it is wrong[,] it should not be continued. Judicial honesty dictates corrective action"); *Commonwealth v. Lawrence*, 326 Pa. 526, 193 A.46 (Pa. 1937) ("[we are by] no means unmindful of the salutary tendency of the rule of [sic] *stare decisis*, but at the same time we cannot be unmindful of the lessons furnished by our own consciousness, as well as by judicial history, of the liability to error and the advantages of review"). Moreover, to the extent the majority would argue the doctrine of *stare decisis* required that the application of the 1996 parole guidelines can never result in an *ex post facto* violation, see Majority Opinion, slip op. at 11, it is mistaken. Further, it should be noted that *Finnegan*'s determination was based upon a counting error because, as discussed above, *Finnegan* relied upon *Winklespecht* in this regard, and *Winklespecht* does not reflect majority support for such a position. *See, e.g., Finnegan*, 838 A.2d at 691 (Saylor, J., dissenting).

Garner and *Morales*.

Messrs. Justice Nigro and Saylor join this dissenting opinion.

APPENDIX B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

BRYAN P. HALL,	:	No. 458 M.D. 2002
	:	
Petitioner,	:	
	:	
v.	:	
	:	
PENNSYLVANIA BOARD OF PROBATION AND PAROLE, *et al,*	:	
	:	
Respondants	:	

ORDER

NOW, November 21, 2002, we order as follows:

1. The stay previously entered is vacated.

2. This court having held in Reynolds v. Pennsylvania Board of Probation and Parole, ___ A.2d ___, No. 524 M.D. 2001, filed October 21, 2002, that the amended statement of policy in what is commonly known as the Parole Act, Act of August 6, 1941, P.L. 861, as amended, 61 P.S. §§ 331.1-331.34.1, does not create any substantive rights, Respondents' application for summary relief is granted as to this count.

3. Respondents having now issued a decision in this matter that supplies reasons for the parole denial, this issue is rendered moot.

4. This court having held in Reynolds v. Pennsylvania Board of Probation and Parole, ___ A.2d ___,

No. 524 M.D. 2001, filed October 21, 2002, that a form containing parole guidelines is not a "law" subject to *ex post facto,* Respondent's application for summary relief is granted as to this count.

5. To the extent petitioner alleges that his parole was denied in order to comply with an alleged contract with the federal government, parole-making decisions are not affected by any contract with the federal government. Carter v. Muller, 45 F. Supp. 453 (E.D. Pa. 1999); Commonwealth v. Baldwin, 760 A.2d 883 (Pa. Super. 2000). See also Stewart v. Pennsylvania Board of Probation and Parole, 714 A.2d 502 (Pa. Cmwlth. 1998) (even if Parole Board adopted a policy allowing it to comply with percentages established by the Violent Incarceration and Truth-in-Sentencing Initiative Grants Act, 42 U.S.C. §§ 13701-712, this does not preclude it from exercising discretion in individual cases). Therefore, Respondent's application for summary relief granted as to this count.

6. Petitioner's petition for review is dismissed.

7. Respondents' second application for stay is dismissed as moot.

APPENDIX C

COMMONWEALTH OF PENNSYLVANIA
PENNA. BOARD OF PROBATION AND PAROLE

DATE: 06/13/2002

CLIENT NAME: BRYAN P. HALL PAROLE NO. 6668S
INSTITUTION: SCI-DALLAS INSTITUTION NO.: BP9573

AS RECORDED ON 06/13/2002 THE BOARD OF PROBATION AND PAROLE RENDERED THE FOLLOWING DECISION IN YOUR CASE:

FOLLOWING AN INTERVIEW AND REVIEW OF YOUR FILE, THE PENNSYLVANIA BOARD OF PROBATION AND PAROLE HAS DETERMINED THAT THE FAIR ADMINISTRATION OF JUSTICE CANNOT BE ACHIEVED THROUGH YOUR RELEASE ON PAROLE. YOU ARE THERE THEREFORE REFUSED PAROLE AND ORDERED TO:

BE REVIEWED IN OR AFTER MARCH 2003

AT YOUR NEXT INTERVIEW, THE BOARD WILL REVIEW YOUR FILE AND CONSIDER:
WHETHER YOU HAVE CONTINUED TO PARTICIPATE IN/SUCCESSFULLY COMPLETED A TREATMENT PROGRAM FOR:
SEX OFFENDERS.
WHETHER YOU HAVE MAINTAINED A FAVORABLE RECOMMENDATION FOR PAROLE FROM THE DEPARTMENT OF CORRECTIONS.
WHETHER YOU HAVE MAINTAINED A CLEAR CONDUCT RECORD AND COMPLETED THE

DEPARTMENT OF CORRECTIONS' PRESCRIPTIVE PROGRAM(S).

KLS 06/13/2002

/s/
KATHLEEN ZWIERZYNA
BOARD SECRETARY

APPENDIX D

COMMONWEALTH OF PENNSYLVANIA
BOARD OF PROBATION AND PAROLE
1101 S. Front Street
Harrisburg, Pa. 17104-2519

NOTICE OF BOARD DECISION

CLIENT NAME: BRYAN P. HALL PAROLE NO. 6668S
INSTITUTION: SCI-DALLAS INSTITUTION NO.: BP9573

AS RECORDED ON OCTOBER 28, 2002, THE BOARD OF PROBATION AND PAROLE RENDERED THE FOLLOWING DECISION IN YOUR CASE:

REFER TO NOTICE OF BOARD DECISION OF 06-13-2002, AND MODIFY IT TO READ.

FOLLOWING AN INTERVIEW WITH YOU AND A REVIEW OF YOUR FILE, AND HAVING CONSIDERED ALL MATTERS REQUIRED PURSUANT TO THE PAROLE ACT OF 1941, AS AMENDED, 61 P.S. § 331.1 ET SEQ., THE BOARD OF PROBATION AND PAROLE, IN THE EXERCISE OF ITS DISCRETION, HAS DETERMINED AT THIS TIME THAT: YOUR BEST INTERESTS DO NOT JUSTIFY OR REQUIRE YOU BEING PAROLED/REPAROLED; AND, THE INTERESTS OF THE COMMONWEALTH WILL BE INJURED IF YOU WERE PAROLED/REPAROLED. THEREFORE, YOU ARE REFUSED PAROLE/REPAROLE AT THIS TIME. THE REASONS FOR THE BOARD'S DECISION INCLUDE THE FOLLOWING:

THE RECOMMENDATION MADE BY THE PROSECUTING ATTORNEY.
REPORTS, EVALUATIONS AND ASSESSMENTS CONCERNING YOUR PHYSICAL, MENTAL AND BEHAVIOR CONDITION AND HISTORY.
OTHER FACTORS DEEMED PERTINENT IN DETERMINING THAT YOU SHOULD NOT BE PAROLED: YOUR PRIOR CRIMINAL HISTORY.

YOU WILL BE REVIEWED IN OR AFTER MARCH, 2003.

AT YOUR NEXT INTERVIEW, THE BOARD WILL REVIEW YOUR FILE AND CONSIDER:
WHETHER YOU HAVE CONTINUED TO PARTICIPATE IN/SUCCESSFULLY COMPLETE A TREATMENT PROGRAM FOR: SEX OFFENDERS.
WHETHER YOU HAVE MAINTAINED A FAVORABLE RECOMMENDATION FOR PAROLE FROM THE DEPARTMENT OF CORRECTIONS.
WHETHER YOU HAVE MAINTAINED A CLEAR CONDUCT RECORD AND COMPLETED THE DEPARTMENT OF CORRECTIONS' PRESCRIPTIVE PROGRAM(S).

SLR 10-28-2002

/s/
Kathleen Zwierzyna
Board Secretary

APPENDIX E

The *ex post facto* clause, U.S. Const. Art. 1, § 10:

Section 10. No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts, or grant any title of nobility. . . .

61 P.S. § 331.1 (prior to 1996 amendments):

The value of parole as a disciplinary and corrective influence and process is hereby recognized, and it is declared to be the public policy of this Commonwealth that persons subject to or sentenced to imprisonment for a crime shall, on release therefrom, be subjected to a period of parole during which their rehabilitation, adjustment and restoration to social and economic life and activities shall be aided and facilitated by guidance and supervision under a competent and efficient parole administration, and to that end it is the intent of this act to create a uniform and exclusive system for the administration of parole in this Commonwealth.

61 P.S. § 331.1 (as amended in 1996):

The parole system provides several benefits to the criminal justice system, including the provision of adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from

prison. In providing these benefits to the criminal justice system, the board shall first and foremost seek to protect the safety of the public. In addition to this goal, the board shall address input by crime victims and assist in the fair administration of justice by ensuring the custody, control and treatment of paroled offenders.

No. 04-194

In the Supreme Court of the United States

BRYAN P. HALL,
Petitioner

v.

PENNSYLVANIA BOARD OF PROBATION AND PAROLE,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Pennsylvania Board of Probation and parole's application of the 1996 amendment to the Parole Act to an inmate sentenced before the effective date of the amendment violates the *Ex Post Facto* Clause of the U.S. Constitution?

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STATEMENT OF THE CASE

In 1996, the Pennsylvania General Assembly amended the language of the introductory section of the Pennsylvania Parole Act. The Supreme Court of Pennsylvania, construing this amendment, held that this change in the statute's language did not change it in substance, and accordingly held that its retroactive application does not violate the Constitution's *Ex Post Facto* Clause. Petitioner seeks review by this Court on the theory that this holding is not only wrong, but conflicts with a holding of the Court of Appeals for the Third Circuit on the same issue.

It is certainly true that the Pennsylvania Supreme Court and Third Circuit have each addressed the *ex post facto* issue presented by the 1996 amendment in a series of cases, in which each court has commented upon the decisions of the other, as well as upon its own earlier decisions. This "conversation" between the two courts, however, has not — at least not yet — hardened into a confrontation, nor, we think, has the last word in that conversation yet been spoken. To explain why, we first discuss the statutory provisions which form the backdrop for the ex post facto issue, and then the various state and federal decisions which have addressed it.

1. Parole in Pennsylvania is governed by the Probation and Parole Act, Pa. Stat. Ann., tit. 61, §§ 331.1 through 331.34a (Purdon 1999) ("Parole Act"). Enacted in 1941, the Parole Act establishes the Board of Probation and Parole, which among other things has the "exclusive power to parole and reparole" all persons sentenced to two years or more of imprisonment. *Id.*, § 331.7.

Prisoners are not eligible for parole until they have served their minimum sentence. *Id.*, § 331.21 (a). In

deciding whether to grant a parole, the Board is to inform itself of the prisoner's complete criminal record, conduct while in prison, and "physical, mental and behavior condition and history"; and the Board is to consider "the nature and circumstances of the offense committed," any recommendations of the trial judge and prosecutor, and "the general character and background of the prisoner." *Id.*, § 331.19. In addition, a member or designee of the Board must have "seen and heard" the prisoner "in person" before granting or denying parole. *Id.*, § 331.22.

But within these limits, the Parole Act confers unfettered discretion upon the Board. The Board, "in [its] discretion," may release on parole any prisoner "whenever in its opinion the best interests of the convict justify or require his being paroled and it does not appear that the interests of the Commonwealth will be injured thereby." *Id.*, § 331.21. Thus, "the granting of parole is wholly discretionary" with the Board, *Coady v. Vaughn*, 770 A.2d 287, 290 (Pa. 2001); "a prisoner has only a right to apply for parole ... and to have that application considered by the Board." *Rogers v. Bd. of Probation and Parole*, 724 A.2d 319, 321 n.2 (Pa. 1999). Since the legislature "has conferred upon the Parole Board *sole* discretion" to grant or deny paroles, *Rogers*, 724 A.2d at 322 (emphasis added), the grant or denial of parole is not ordinarily subject to judicial review by the Pennsylvania courts. Those courts will, however, entertain an action in mandamus to compel the Board to exercise its discretion, *see, e.g., Marshall v. Bd. of Probation and Parole*, 638 A.2d 451 (Pa. Cmwlth. 1994), or to assert a *constitutional* challenge to the denial of parole. *Coady v. Vaughn, supra* (claim of *ex post facto* violation may be addressed in mandamus action).

Petitioner's *ex post facto* claim centers around an amendment to Section 1 of the Parole Act. Until 1996, Section 1 read as follows:

> The value of parole as a disciplinary and corrective influence and process is hereby recognized, and it is declared to be the public policy of this Commonwealth that persons subject or sentenced to imprisonment for crime shall, on release therefrom, be subjected to a period of parole during which their rehabilitation, adjustment, and restoration to social and economic life and activities shall be aided and facilitated by guidance and supervision under a competent and efficient parole administration, and to that end it is the intent of this act to create a uniform and exclusive system for the administration of parole in this Commonwealth.

Act of August 6, 1941, P.L. 861, § 1, *formerly codified at* Pa. Stat. Ann., tit. 61, § 331.1 (Purdon). In 1996, Section 1 was amended to read:

> The parole system provides several benefits to the criminal justice system, including the provision of adequate supervision of the offender while protecting the public, the opportunity for the offender to become a useful member of society and the diversion of appropriate offenders from prison.
>
> In providing these benefits to the criminal justice system, the board shall first and foremost seek *to protect the safety of the public.* In addition to this goal, the board shall address input by crime victims and assist in the fair administration of justice by ensuring the custody, control and treatment of paroled offenders.

Pa. Stat. Ann., tit. 61, § 331.1, *as amended by* Act of December 18, 1996, P.L. 1098, No. 164, § 1 (emphasis added).

This amendment to Section 1 did not alter the conditions of eligibility for parole, *see id.*, § 331.21, nor did it alter the matters which the Parole Board was required to consider in deciding parole applications, *see id.*, § 331.19, nor did it alter the Board's authority to grant parole "in [its] discretion." *Id.*, § 331.21.

2.a. Accordingly, the Supreme Court of Pennsylvania has repeatedly held that this change in the language of Section 1, and particularly the addition of language regarding the protection of the public safety, did not betoken any change in the statute's substance. The Supreme Court first addressed this issue in *Winklespecht v. Bd. of Probation and Parole*, 813 A.2d 688 (Pa. 2002):

> Although the language concerning "protect[ing] the safety of the public" and "assist[ing] in the fair administration of justice" was added to § 331.1 in 1996, these concepts are *nothing new* to the parole process and have *always* been underlying concerns. Both versions of § 331.1 leave the decision regarding the grant of parole within the discretion of the Board; the fact that some language was added in 1996, which clarified the policy underlying the parole process, does nothing that increases ... punishment.

Winklespecht v. Bd. of Probation and Parole, 813 A.2d 688, 692 (Pa. 2002) (plurality opinion) (emphases added). The Supreme Court therefore concluded that the change to Section 1 does not violate the *Ex Post Facto* Clause. *Ibid*; *accord id.*, at 693 (Castille, J., concurring) ("fully agree ... that the *ex post facto* claim

... is entirely meritless); *id.*, at 696 (Saylor, J., concurring and dissenting) (pre-amendment statutory provisions "manifestly subsume public safety, as well as the fair administration of justice"). The Supreme Court later adopted the analysis of the *Winklespecht* plurality by a clear majority in *Finnegan v. Bd. of Probation and Parole*, 838 A.2d 684 (Pa. 2003).

b. In the meantime, the Third Circuit was also confronting this issue. A few weeks after the state Supreme Court decided *Winklespecht*, the Third Circuit issued its decision in *Mickens-Thomas v. Vaughn*, 321 F.3d 374 (3d Cir. 2003), *cert. denied sub nom. Gillis v. Hollowell*, — U.S. — (2003). In *Mickens-Thomas*, the Third Circuit held that the Board had reacted to the 1996 amendment to Section 1 by applying a more stringent parole policy than had been the case before, and that this new policy violated the *Ex Post Facto* Clause. *Id.*, 321 F.3d at 375, 377-380, 383-386. The Third Circuit recognized that, in *Winklespecht*, "the Pennsylvania Supreme Court had held that [the 1996 amendment] does not change Pennsylvania policy as to the criteria for parole." *Id.*, at 391. The Third Circuit did not disagree with this holding, resting as it did upon the state Supreme Court's construction of a state statute, but found it irrelevant to its analysis, which rested instead on the Board's pre-*Winklespecht understanding* of the 1996 amendment:

> This [*Winklespecht*] decision, made after the Board's actions ... came too late to alter the Board's view of the statutory amendment on the outcome of this case. Not having the benefit of the [Pennsylvania] Supreme Court decision, ... *[t]he Board mistakenly construed the 1996 statutory change to signify a substantive change in its parole function.* ... The Board's actions ... [were] uninfluenced by

> the subsequent Court interpretation of the statute.

Ibid (emphasis added). Thus, the Third Circuit in *Mickens-Thomas* did *not* hold that the 1996 amendment itself violated the *Ex Post Facto* Clause, but held merely that the Board had done so through its mistaken interpretation of that amendment.

Later Third Circuit decisions discussing *Mickens-Thomas*, however, clouded this distinction. In *Hollowell v. Gillis*, 65 Fed.Appx. 809, 2003 WL 1919371 (3d Cir. 2003) (not precedential), *cert denied*, — U.S. — (2003), another Third Circuit panel said that "*Mickens-Thomas* clearly holds as a legal matter that the Pennsylvania statutory change violates the *Ex Post Facto* Clause," *id.*, at 816, *7, and on the strength of this reading of *Mickens-Thomas* declined to follow *Winklespecht*. *See also McLaurin v. Larkins*, 76 Fed.Appx. 415, 416, 2003 WL 22147497 (3d Cir. 2003) (not precedential) ("*Mickens-Thomas* ... held that the retroactive application of the 1996 amendment to Pennsylvania's Parole Act's statement of public policy violated the *Ex Post Facto* Clause"). These decisions, however, having been designated "not precedential," do not bind subsequent panels of the Third Circuit, *see* 3d Cir. Int. Op. Proc. 5.1, 5.7; moreover, not all Third Circuit decisions have adopted this reading of *Mickens-Thomas*. *See, e.g., Hart v. Bd. of Probation and Parole*, 82 Fed.Appx. 276, 277-278, 2003 WL 22838381 (3d Cir. 2003) (discussing *Mickens-Thomas* holding in terms of the Board's "understanding" of the 1996 amendment).

This brings us to petitioner's case.

3. Bryan P. Hall, the petitioner, is a state prisoner sentenced on September 13, 1991 to a term of from four to twenty years for aggravated assault, aggravated

indecent assault, and related charges. In decisions dating back to 1995, the Parole Board repeatedly denied his parole applications. Pet. App. 3a-4a. Petitioner brought a mandamus action in Pennsylvania's Commonwealth Court against the respondent, the Pennsylvania Board of Probation and parole, claiming that applying the 1996 amendments to his applications for parole violated the Constitution's *Ex Post Facto* Clause. The Board moved for summary relief, and Commonwealth Court granted the motion, concluding that the amended statement of policy in the Parole Act did not create any substantive rights, and that a Parole Board form containing parole guidelines was not a "law" for purposes of the *Ex Post Facto* Clause. Pet. App. 25a-26a.

Petitioner appealed to the Pennsylvania Supreme Court, which described his claim as follows:

> Hall contend[s] that the 1996 amendments to the Parole Act *materially changed the criteria* for granting and denying parole, and that application of the amended Parole Act to his parole requests violated the constitutional prohibition against *ex post facto* laws.

Pet. App. 4a (emphasis added). This, the court said, was the "exact question," Pet. App. 6a, which it had already decided in *Winklespecht v. Pennsylvania Board of Probation and Parole, supra* and *Finnegan v. Pennsylvania Board of Probation and Parole, supra*; and the court held that Hall's claim was foreclosed by the holding of those cases that the 1996 amendment added "nothing new" to the parole process. Pet. App. 6a-7a.

The Supreme Court then discussed the Third Circuit's decision in *Mickens-Thomas v. Vaughn, supra*, as well as the gloss placed upon *Mickens-Thomas* by *Hollowell v. Gillis, supra*, and *McLaurin v. Larkins,*

supra. Pet. App. 8a-14a. The Supreme Court thought that *Mickens-Thomas* had decided the "identical substantive contention" as *Winklespecht*; but had simply refused to follow its lead: "[t]he Third Circuit rejected the determination of this Court in *Winklespecht*...." Pet. App. 8a. The Supreme Court, relying on principles of *stare decisis* and federalism, held that it was not bound by the Third Circuit's decision, and declined in its turn to follow the lead of *Mickens-Thomas*.

REASONS FOR DENYING THE WRIT

1. The petition rests on the assertion that the Court ought to hear this case in order to resolve a direct and irreconcilable conflict between the Pennsylvania Supreme Court and the United States Court of Appeals for the Third Circuit in their evaluation of claims that amendments to the State Parole Act in 1996 violate the *Ex Post Facto* Clause when applied to prisoners whose crimes predate the amendments. The two courts have reached opposite conclusions, petitioner says, adding that the state supreme court ought to have deferred to the federal court of appeals.[1]

We believe the petition is premature. As we have explained, the Court of Appeals' decision in *Mickens-Thomas* does *not* directly conflict with the *Winklespecht* line of cases, although the Pennsylvania Supreme Court may well have been misled into thinking that it did by the gloss on *Mickens-Thomas* in some of the Court of Appeals' unpublished opinions.

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[1] Petitioner also argues that the decisions of the state court are substantively wrong, conflicting with *Garner v. Jones*, 529 U.S. 244 (2000), a decision which he says requires the court to entertain proof by a prisoner that an amended law increases the likelihood that he will serve more time in prison. *Garner* is distinguishable on the facts, since it involved a decrease in the frequency of parole reconsideration hearings for inmates serving life sentences from every three years to every eight years. The Court recognized that during the period between parole reviews, the Parole Board would not exercise its discretion at all, and thus, on its face, it appeared that the change could increase the likelihood of a longer sentence. *Garner* certainly did not say that an inmate must be permitted to show whether an amended law increase the likelihood of his serving a longer term where the amendments amount to no more than a rewording of existing law, and make no substantive or procedural change, as the Pennsylvania Supreme Court has said is the case here.

The Pennsylvania Supreme Court has certainly said that the 1996 amendments to the Parole Act do not support an *ex post facto* claim, in part because they have effected no change in the state law. The Court of Appeals, however, has not placed itself squarely at odds with this view in *Mickens-Thomas*, focusing instead on the Parole Board's perception of the effect of the amendments.

Thus, there is not yet the direct conflict between state and federal courts that petitioner claims, and the Court ought to want to see whether a direct conflict develops. There are currently cases pending before the Court of Appeals in which it will resolve the issue, either deferring to the State Supreme Court's interpretation of the state statute, or placing itself in direct conflict with it. If a direct conflict develops in any of those cases, we will petition the Court to resolve it.

2. The petition is premature and the conflict it presents illusory for another reason. Having exhausted his *ex post facto* claim in the state courts, the petitioner's next step is not to petition this Court to decide the issue, sidestepping the procedure Congress has in place for handling such claims, but to proceed via 28 U.S.C. §2254 by filing a petition for writ of habeas corpus. In habeas proceedings, it is the federal courts that defer to state court judgments and not, as petitioner here argues, vice versa. The Act provides that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d).

Petitioner must now pursue his habeas remedy in federal court, and if, at the end of that process, the decision of the Court of Appeals presents a direct conflict with that of the Pennsylvania Supreme Court, a petition for certiorari will be appropriate.

CONCLUSION

For the foregoing reasons, the petition should be denied.

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No. 04-194

IN THE

Supreme Court of the United States

BRYAN P. HALL,

Petitioner,

vs.

PENNSYLVANIA BOARD OF PROBATION AND PAROLE,

Respondent.

Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION

A. THE BOARD'S PREMATURITY ARGUMENT IS CONTRADICTED BY THE VIEWS OF THE PENNSYLVANIA SUPREME COURT, THE THIRD CIRCUIT AND THE BOARD ITSELF LAST YEAR IN ITS OWN *CERTIORARI* PETITION.

Mr. Hall's contention that there is a direct conflict between the Pennsylvania Supreme Court and the Third Circuit on the *Ex Post Facto* issue is supported by the written determinations of seven justices of the Pennsylvania Supreme Court, at least five judges of the Third Circuit and what the Pennsylvania Board of Probation and Parole (the "Board") itself told this Court just a year ago.

In its opposition to Mr. Hall's *certiorari* petition, the Board asserts that "the Third Circuit in *Mickens-Thomas* did *not* hold that the 1996 amendment itself violated the *Ex Post Facto* Clause, but merely that the Board had done so through its mistaken interpretation of that amendment." Opposition at 6 (emphasis original). Neither the Pennsylvania Supreme Court nor the Third Circuit shares the Board's view.

In *Winklespecht* v. *Pennsylvania Board of Probation and Parole,*[1] the Pennsylvania Supreme Court concluded that the 1996 amendments to the Parole Act did not violate the *Ex Post Facto* Clause. Just a few months later, in *Mickens-Thomas* v. *Vaughn,*[2] the Third Circuit

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1 813 A.2d 688 (Pa. 2002).

2 321 F.3d 374 (CA3 2003).

reached the opposite conclusion. A few months after that, in *Finnegan* v. *Pennsylvania Board of Probation and Parole,*[3] the Pennsylvania Supreme Court explained that "[t]he Third Circuit recently held the 1996 changes to § 331.1 violated the *ex post facto* clause . . ."[4] and held that "[w]e reiterate that the 1996 revision of § 331.1 of the Parole Act does not violate the *ex post facto* clause when applied to a prisoner convicted prior to the revision."[5] In other words, the court understood itself to be in conflict with the Third Circuit's decision in *Mickens-Thomas*.

In this case, decided a year after *Mickens-Thomas,* the Pennsylvania Supreme Court explained that

> Hall recognized this divergence in legal authority when he asked us to consider his appeal in light of *Mickens-Thomas.* Accordingly, given our rejection of the *ex post facto* argument in *Winklespecht,* as clarified by *Finnegan,* at this juncture our concern is no longer a question of whether there is an *ex post facto* violation, but whether we are constrained by *Mickens-Thomas.*[6]

Had there been no conflict, there would have been no reason for the court even to consider if it were bound by the Third Circuit's decision in *Mickens-Thomas.* The three dissenting justices in *Hall* explained that "the majority recognizes that tension exists between the decisions of this court . . . and the concurrent pronouncement of the Third

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3 838 A.2d 684 (Pa. 2003).

4 838 A.2d at 689.

5 838 A.2d at 690.

6 *Hall* v. *Pennsylvania Board of Probation and Parole,* 851 A.2d 859, 863 (Pa. 2004).

Circuit Court of Appeals in *Mickens-Thomas.*"[7] Thus, all seven justices saw the conflict.

The Third Circuit also does not share the Board's understanding. For example, in *Nolan* v. *Gillis,* the Third Circuit explained that "this court decided *Mickens-Thomas* [], ruling that the 1996 amendment to 61 P.S. § 331.1 . . . violated the *Ex Post Facto* Clause when applied retroactively."[8] *See also, Hollawell* v. *Gillis* ("*Mickens-Thomas* clearly holds as a legal matter that the Pennsylvania statutory change violates the *Ex Post Facto Clause.*").[9]

Thus, whatever might be the Board's current view, the justices and judges who actually decide cases in the Pennsylvania Supreme Court and in the Third Circuit believe there to be a ripe and direct conflict.

Importantly, the Board itself saw a conflict, at least until it filed its opposition to Mr. Hall's petition. After the Third Circuit decided *Mickens-Thomas* and a companion case against the Board, the Board sought this Court's review. The petition's opponent argued that the conflict was not yet ripe, and the Board replied:

> Respondents suggest that this conflict [between the Third Circuit and the Pennsylvania Supreme Court] is either illusory . . . or tolerable, because the

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7 *Hall,* 851 A.2d at 868 (Cappy, C.J., dissenting).

8 98 Fed.Appx. 159,161 (CA3 2004).

9 65 Fed. Appx. 809, 816 (CA3 2003); *See also, McLaurin* v. *Larkins,* 76 Fed.Appx. 415 (CA3 2003), and *Hart* v. *Penn-sylvania Board of Probation and Parole,* 82 Fed.Appx. 276 (CA3 2003).

> Pennsylvania Supreme Court may, in some later case, change its mind and follow the lead of the Court of Appeals . . . As for the suggestion that this conflict may eventually resolve itself without the Court's intervention, we submit that the courts of Pennsylvania will not likely defer to the federal Court of Appeals on an issue which is so thoroughly entwined with well-settled issues of state law; and in any event, the Commonwealth's parole system cannot be left indefinitely in limbo merely on the off-chance that they might.
>
> *The conflict between the Pennsylvania and federal courts – including, but emphatically not limited to, the conflict with* Winklespecht *– must be resolved now, for the harm inflicted by the Court of Appeals is already beginning to spread.*[10]

Without this Court's intervention, the Board urged, there would be "widespread disruption to [Pennsylvania's] parole system."[11] In the year since the Board took that position, the two courts have hardened their positions, and the division has deepened. There is a direct and irreconcilable split between the Pennsylvania Supreme Court and the Third Circuit, and this Court should resolve it.

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[10] Reply to Brief in Opposition, *Gillis* v. *Hollawell,* No. 03-47, at 5-6 (filed September 9, 2003) (emphasis added). Respondent's reply is available on Westlaw at 2003 WL 22428479.

[11] *Id.* at 8.

B. THE BOARD'S EFFORT TO DISTINGUISH *GARNER* IS UNAVAILING.

In its opposition to Mr. Hall's petition, the Board addresses only in a footnote Mr. Hall's argument that the Pennsylvania Supreme Court's decision in his case conflicts with *Garner* v. *Jones*.[12] The Board's attempt to distinguish *Garner* fails.

In *Garner,* the Court explained that '[w]hen the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule."[13] Thus, the proper analysis requires consideration both of the statute or rule on its face and as applied.

The Pennsylvania Supreme Court, in this case and in those that form the legal predicates for this case, ignored the practical effect and implementation of the 1996 amendments, and the court's majority focused only on the language of the statute. The three dissenting justices in *Finnegan* recognized the error: "Appellant's entitlement to a hearing on such averment is confirmed by the United States Supreme Court's decision cited by the majority, *Garner v. Jones* . . . [The majority] overlooks that *Garner* resulted in a remand for a hearing to address factual averments concerning the incidence of favorable parole determinations analogous to those presently before this

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12 529 U.S. 244 (2000).

13 *Id.*

Court."[14] The state-court majority seemed to presume that, if the statute granted discretion to the Board, there could be no *Ex Post Facto* problem.[15] *Garner* makes clear that is not so.[16]

The analysis employed by the Pennsylvania Supreme Court in this and similar cases conflicts with the analysis this Court required in *Garner,* and that provides another basis for this Court to grant review.

C. THE BOARD'S SUGGESTION THAT MR. HALL IS OBLIGATED TO SEEK *HABEAS* RELIEF BEFORE REQUESTING THIS COURT'S REVIEW IS UNSUPPORTED AND WRONG.

The Board suggests that Mr. Hall is somehow obligated to seek *habeas* review before he can seek this Court's review. No authority supports that argument.

The Court need not tarry long on that point. This Court routinely reviews matters on *certiorari* to state courts when the claims presented could later be the subject of *habeas* petitions. *See, e.g., Weaver* v. *Graham*[17] (an *Ex Post Facto* case), *Bunkley* v. *Florida*[18] and *Sattazahn* v. *Pennsylvania.*[19] This Court has never suggested that an

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14 838 A.2d at 691 (Saylor, J., dissenting).

15 *Hall,* 851 A.2d at 868 (Cappy, C.J., dissenting) (in *Finnegan,* "[t]he majority firmly stated that a change in policy guiding the discretion of the parole board can never support a claim of an *ex post facto* violation in the denial of parole.").

16 529 U.S. at 253 ("The presence of discretion does not displace the protections of the *Ex Post Facto* Clause, however.").

17 450 U.S. 24 (1981).

18 538 U.S. 835 (2003).

19 537 U.S. 101 (2003).

error by a state's highest court on a question of federal law must first be funneled through *habeas* review before this Court will correct it. Indeed, most treatises suggest the opposite.[20] Mr. Hall has properly sought this Court's intervention at this time.

CONCLUSION

The Court should grant the petition for a writ of *certiorari* to consider the three questions presented.[21]

September 17, 2004

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[20] *See, e.g.*, R. Hertz and J. Liebman, *Federal* Habeas Corpus *Practice and Procedure* at § 3.5a (4th ed. 2001).

[21] The Board has not addressed the second and third issues raised in Mr. Hall's petition. They provide additional bases for this Court to grant review.